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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS,

Petitioner,

vs.

ELJAY BOWRON, ROBERT RUBIN, and JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conviction may be obtained under 18 U.S.C. § 474 against an artist whose work includes likenesses in various degrees of resemblance to United States currency where the artist has no intent to defraud, in light of the principles that (a) *scienter* is a necessary element for conviction of any felony where First Amendment rights are implicated and (b) a statute must be interpreted to avoid serious First Amendment concerns.

2. If the answer to question 1 is "yes," whether 18 U.S.C. §§ 474 and 504 unconstitutionally restrict rights of free expression secured by the First Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. ·

J.S.G. BOGGS,

Petitioner,

v.

ELJAY BOWRON,
ROBERT RUBIN, AND JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

J.S.G. Boggs, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The unpublished opinion of the court of appeals (App. 1a-3a) is reported at 67 F.3d 972 (table). The opinion of the District Court (App. 4a-46a) is reported at 842 F. Supp. 542.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1995 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

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[1]This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. 18 U.S.C. § 474(a) (Supp. V 1993) provides in part:

> **§ 474. Plates or stones for counterfeiting obligations or securities**
>
> (a) * * * *
>
> [5] Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> [6] Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class C felony.

3. 18 U.S.C. § 504 (Supp. V 1993) provides in part:

> **§ 504. Printing and filming of United States and foreign obligations and securities**

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.

Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white . . . ;

(ii) all illustrations . . . shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph . . .; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary

determines may be appropriate for such purposes.

* * * *

STATEMENT[2]

The Artist. J.S.G. Boggs is an internationally recognized artist whose work is in the permanent collections of the Smithsonian Institute, the British Museum, and the Art Institute of Chicago. He is represented by the Nancy Drysdale Gallery in Washington, D.C. Boggs received formal training in fine arts at Columbia University and holds a lifetime appointment at Carnegie Mellon University's Center for the Advancement of Applied Ethics. *See* App. 5a-6a & nn.5-6; Boggs Aff. ¶ 1-2; Mayer Decl. ¶ 4.

Boggs' hallmark is the use of images of money in his work, which offers a commentary on social, political, and philosophical issues and is rooted in a strong historical tradition. Chambers Decl. ¶¶ 5-12; Mayer Decl. ¶¶ 5-6. An example of his work from the record is reproduced, in actual size, at App. 56a.

Like many modern artists, Boggs has struggled to make his work accessible to ordinary people. To bring his work out of the museums and galleries and into the street, he engages in transactions using his art as a medium of barter. In proposing a transaction, Boggs offers to exchange a work of art, sometimes the same size as currency but generally one-sided, for goods or services. The proposal is designed to elicit a dialogue about the meaning and use of art and money in everyday life. The viewer grapples with questions about what art should look like, what should be done with it, what it represents, why we value money, and why we value art. Sometimes the art is accepted in exchange for goods or

---

[2]Because this case is before the Court on a grant of summary judgment against Petitioner, this statement is drawn from the affidavits and other evidence in the record, drawing all reasonable inferences in favor of Petitioner.

services, sometimes not. App. 6a-7a & nn.8-10; Boggs Aff. ¶¶ 6-8; Mayer Decl. ¶¶ 6-7.

Boggs does not defraud anyone. People who accept his work do so with full knowledge that it is not genuine currency—and not only because of Boggs' representations. Boggs' work has never been—and cannot be—"passed off" as genuine to a person of ordinary observation. *See* App. 56a. Indeed, over the years, Boggs has created and bartered thousands of works of art around the world. There is no evidence in the record of a single person who has complained to any law-enforcement authority about being defrauded by Boggs or anyone else using his art. In the District Court, we repeatedly challenged Respondents to produce such evidence. They could not. App. 6a-7a, 35a & n.35.

Censored and Harassed By Federal Agents. Agents of the Secret Service—the federal agency charged with enforcing the anti-counterfeiting statutes—have repeatedly harassed Boggs, apparently because they do not like the subject matter of his work. While many publishers and advertisers large and small use images of money, the Secret Service has singled out Boggs, repeatedly censoring him, confiscating his art, and threatening to imprison him.

Because Boggs has no intent to defraud—indeed he is extremely careful to avoid creating art that could be used to defraud—the Government has never invoked the statutes that prohibit counterfeiting *per se*, for they expressly require an "intent to defraud." Instead, the Secret Service has attempted to invoke two clauses of 18 U.S.C. § 474, a statute originally enacted in 1862 "to prevent and punish counterfeiting" by proscribing "the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations." *See United States* v. *Raynor*, 302 U.S. 540, 548 (1938). Those two clauses do not expressly contain an intent-to-defraud element and have therefore been interpreted as strict-liability prohibitions by the Secret Service. The Secret Service further claims that section 474 may be invoked against Boggs because his work does not fall within the safe harbor of 18 U.S.C. § 504 for an "illustration" of money that meets certain size and color limitations, that is, that it

be smaller than 75% or greater than 150% of actual size *and* in black and white.

In September 1990, Secret Service agents in Florida censored a catalog entitled *smart money (HARD CURRENCY)*, which was to accompany an exhibition of Boggs' work. Boggs originally designed the catalog to present reproductions of his work in its actual dimensions and colors. Secret Service agents told the printer that he had violated the counterfeiting laws by creating color separations for the catalog and that printing the catalog as designed would be a further crime. Naturally, the printer refused to print the catalog in the face of this "advice." With the exhibition scheduled to begin shortly, Boggs was forced to redesign the content of the catalog to comport with the Secret Service's views of what did or did not violate 18 U.S.C. § 474 and its companion, 18 U.S.C. § 504. The United States Attorney declined prosecution. App. 7a; Verified Complaint ¶¶ 9-10; Boggs Decl. ¶ 2; Bittman Decl. ¶¶ 5-7.

In March 1991, while Boggs was in Cheyenne, Wyoming for the opening in that city of the *smart money (HARD CURRENCY)* exhibition, a Secret Service agent and the United States Attorney for the District of Wyoming appeared at Boggs' hotel-room door and demanded that Boggs hand over his entire inventory of art. The United States Attorney himself presided over a warrantless seizure of Boggs' First Amendment materials, while the Secret Service agent repeatedly threatened to arrest Boggs. After several hours of tense negotiation, the United States Attorney agreed to take only fifteen specimens and told Boggs that they would be sent to Washington, D.C., for a "determination" of whether the work was "contraband." Despite repeated demands, the Secret Service has flouted well-established constitutional law for years, refusing to return the art or seek a hearing approving its seizure. Again, the United States Attorney declined prosecution. App. 7a-8a; Verified Complaint ¶¶ 11-12; Boggs Decl. ¶ 3.

Then, in December 1992, Secret Service agents in Pennsylvania seized more than 1300 items of personal property including dozens of drawings from Boggs' home and faculty office. They destroyed valuable pieces of art during their search. They

"accidentally" smashed Boggs' eyeglasses by picking them up, dropping them on the floor, and stepping on them. Once again, the United States Attorney declined prosecution. App. 8a; Verified Complaint ¶ 13; Boggs Decl. ¶¶ 4-6.

Respondents have thus refused to present any case against Boggs to a judge and jury, preferring instead to rely exclusively on their persistent course of extrajudicial threats and *ex parte* seizures. Indeed, the United States Attorney in Washington, D.C., has stated in writing that Respondents do not intend even to file a civil forfeiture action, "but will merely keep" Boggs' art as "contraband."

The District Court Decision. On September 3, 1993, Boggs commenced this action in the United States District Court for the District of Columbia, invoking the court's federal-question jurisdiction and seeking declaratory and injunctive relief against the Director of the Secret Service, the Secretary of the Treasury, and the Attorney General in their official capacities. Boggs sought injunctive relief not only against potential prosecution, but also against further harassment by the Secret Service.

On December 9, 1993, the District Court granted Defendants' motion for summary judgment, dismissed the Complaint's First Claim (for declaratory and injunctive relief), and denied Boggs' motion for a preliminary injunction as "moot."[3] The basis of this mootness ruling was merely that the claim had been dismissed on the merits—not that anything had rendered the case moot in the traditional Article III sense. Indeed, the District Court found that Boggs has a well-founded fear of prosecution and that he

> is being injured by the Secret Service in a number of ways other than threat of prosecution. Not only has the Secret Service seized his work, but also Mr. Boggs finds himself unable to sell his art. Fear of Secret

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[3]The District Court has held the Complaint's Second Claim (for return of property and money damages) in abeyance pending appellate review. App. 50a.

> Service seizure has also caused the artists' cooperative where Boggs lives to stop accepting his work. Boggs Aff. ¶ 15. Collectors and gallery owners who would like to show or buy Boggs' work are also fearful of Secret Service intervention. *See* Sam Berkovitz Aff.

App. 15a. Because of these injuries, the District Court determined that the case was fully appropriate for a decision on the merits and rejected the Government's contention that the court was powerless to act, holding that Boggs "'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'" to protect his First Amendment rights. App. 12a (quoting *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973), and citing *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974)).

The District Court also found that "[n]o one seriously suggests that Mr. Boggs has any intent to defraud," so that "if intent to defraud is statutorily required, no jury could find that the statute applies to Boggs." App. 35a. But the District Court held that "[i]f Congress intended an intent to defraud or an intent to pass as genuine standard it would have said so explicitly." App. 38a (internal quotations and emphasis omitted). In holding that section 474 is a strict-liability felony, the District Court did not point to any "affirmative instruction" by Congress to this effect, as is required by *Morissette* v. *United States*, 342 U.S. 246, 273 (1952), and did not acknowledge two important principles of statutory interpretation: that the First Amendment forbids strict-liability crimes infringing on speech, *e.g.*, *Smith* v. *California*, 361 U.S. 147 (1959); and that, where possible, statutes must be construed to avoid deciding constitutional questions. Instead, the District Court conducted a time-place-and-manner constitutional analysis of the size and color limitations set out in 18 U.S.C. § 504 and upheld their facial validity under the analysis in Justice Stevens' concurring opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641, 704 (1984). App. 32a.

The Court of Appeals Decision. On appeal, the Government acknowledged that if the statute were interpreted as defining a strict-liability felony it would violate the First Amendment. It therefore conceded that "these are not strict liability provisions."

Brief for Appellees 38. Nonetheless, the Court of Appeals affirmed in an unsigned opinion, "substantially for the reasons" stated by the District Court, App. 2a, thereby embracing the District Court's determination that 18 U.S.C. § 474 defines a strict-liability felony. The Court of Appeals explained this holding with the one-line assertion that "[c]onstruing the statutes as Boggs suggests would render them duplicative of §§ 471 and 472 and is required neither by *Morissette* v. *United States*, 342 U.S. 246 (1952), nor by *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994)." App. 2a. The court did not deal with the cases that have held that intent to defraud is a required element for conviction under 18 U.S.C. § 474 and similar statutes. It did not deal with the legislative history of the statute, which was presented to it in detail. It did not deal with the doctrine of avoiding constitutional questions. And it did not deal with the significant technological advances that have rendered the contours of 18 U.S.C. § 504 obsolete. Indeed, it did not elaborate at all on the District Court's analysis of section 504. On all of these issues, it was silent.

REASONS FOR GRANTING THE WRIT

In this civil action for declaratory and injunctive relief against prosecution and harassment, both courts below reached the merits after deciding that the case was properly presented as a procedural matter. Thus, they were of the view that if the statutes invoked by the Government do not cover Boggs, he would be entitled to the relief requested, notwithstanding the procedural objection made by the Government that Boggs should be required to await prosecution (where the Government had elected to proceed through harassment rather than by criminal indictment) or to await a forfeiture action (where the Government had elected to proceed through confiscation rather than by civil complaint). Both courts recognized that this procedural objection was meritless. As the District Court explained,

> Actions for declaratory relief against criminal prosecution have become a common method of challenging the constitutionality of federal statutes. Moreover, courts

> have not hesitated to restrain or enjoin criminal prosecution where First Amendment rights are at stake.

App. 12a. Thus, the only issues presented by this Petition involve whether the statutes mean what the lower courts said they mean and, if so, whether they are consistent with the First Amendment.

I. THE OPINIONS BELOW PLACE MILLIONS IN VIOLATION OF A FELONY STATUTE

Under the lower courts' opinions, a strict-liability felony is being committed by millions of citizens every day as they exercise what they believe to be their free speech rights. This is an extraordinary encroachment on the freedoms of the press and of expression. Dozens of publishers and advertisers every year print millions of copies of the image of United States currency without meeting the safe harbor provisions of 18 U.S.C. § 504. Under the lower courts' interpretation of 18 U.S.C. § 474, the millions of individuals who possess these publications are all subject to felony prosecution on a strict-liability basis.

Possession of images of United States currency is scarcely exclusive to the nefarious world of the counterfeiter. The image of currency is commonplace. It is on the covers and pages of popular magazines, newspapers and books, in advertisements, and on billboards, coupons, and clothing. In an informal survey presented below, we found dozens of images of money published during one recent six-month period that did not satisfy the "safe harbor" of 18 U.S.C. § 504—in magazines with total circulation of more than 86 million. *See* App. 51a-55a. This informal survey did not cover every published magazine, but only a few popular ones. According to the lower courts, the creators and the "users" of these images are all committing felonies punishable by up to twelve years in federal prison. Under their interpretation of the statutes, every single subscriber or reader of these magazines is subject to strict-liability felony prosecution. Extrapolated over the general five-year statute of limitations period (18 U.S.C. § 3282), this is the equivalent of a three-count indictment for every man, woman and child in America.

According to this interpretation of the statute, the editorial, publishing, and printing staffs of most of our nation's large print-media news organizations are similarly subject to multi-ple-count indictments for violation of this strict-liability felony. Indeed, the recent publicity campaign surrounding the redesign of the currency occasioned "violations" on the front pages of leading newspapers across the country. *See infra* p. 16 & n.13.

The lower courts have therefore "criminaliz[ed] a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and their interpretation of the statute does not comport with "settled expectations that the contents of magazines and film are generally [not] subject to stringent regulation." *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 468-69 (1994). Indeed, the lower courts' decisions run directly afoul of this Court's repeated holdings that strict liability and the First Amendment do not mix. *See X-Citement Video, Inc.*, 115 S. Ct. at 472 ("'criminal responsibility may not be imposed without some element of scienter on the part of the defendant'") (quoting *New York* v. *Ferber*, 458 U.S. 747, 765 (1982)); *Smith* v. *California*, 361 U.S. 147, 151 (1959) (strict-liability criminal statutes "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it"); *see also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-80 (1964) (following *Smith* to impose requirement of "actual malice" on libel plaintiffs); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) ("a rule that would impose strict liability on a publisher for [unprotected expression] would have an undoubted 'chilling effect' on speech").

Of course, the damage done to the First Amendment by the decisions below is not that the Government actually *would* indict every man, woman and child in America, but that it has been given *carte blanche* to prosecute almost anyone under this statute, and that it apparently feels free to pick and choose whomever it would like to harass under the statute's auspices. The lower courts have given their imprimatur to this behavior, in a way that directly conflicts with the decisions of this Court and in a way that places millions of persons at risk of prosecution or, worse, *ex parte* gov-

ernment harassment for "violation" of the statute. We respectfully submit that this Court's attention is therefore warranted.

II. THE OPINIONS BELOW IGNORE FUNDAMENTAL RULES OF STATUTORY INTERPRETATION

As the Solicitor General explained in *United States* v. *X-Citement Video Inc.*, 115 S. Ct. 464 (1994), in order to prevail on an argument that a criminal statute affecting rights of free expression is a strict-liability statute, a litigant

> must demonstrate that Congress's intent not to require scienter is so clear as to overcome both the "background assumption of our criminal law," that scienter is required, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and the principle that the federal courts will "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[4]

This Court agreed. 115 S. Ct. at 467-68. Neither the Government nor the lower courts offered any reason why this case does not fall within the principles articulated in *X-Citement*. We submit that because the statute at issue affects so many millions of persons, this case is an even more compelling one for certiorari than *X-Citement* was.

The lower courts' interpretation of the statute is directly at odds with these two well-settled non-constitutional principles of statutory interpretation. *First*, conviction of a felony ordinarily requires a criminal state of mind. Justice Jackson's eloquent and enduring expression of this principle for the Court in *Morissette* v. *United States*, 342 U.S. 246 (1952), remains the touchstone for the rule requiring some "affirmative instruction from Congress to

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[4]Reply Brief for the United States at 1, *United States* v. *X-Citement Video, Inc.*, 115 U.S. 464 (1994).

eliminate intent from any offense." 342 U.S. at 273. Again and again, this rule "has been 'followed in regard to statutory crimes even where the statutory definition did not in terms include it [the requirement of intent].'" *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994) (quoting *United States* v. *Balint*, 258 U.S. 250, 251-52 (1922)). Yet here, the lower courts held that the statute is a strict-liability felony because Congress "knew how" to include a *scienter* element expressly. App. 2a, 38a.

To be sure, some "affirmative expression" from Congress to the contrary might override the *Morissette* presumption (though constitutional constraints would then be encountered). But here the statutory text contains no such expression. And the legislative history reveals an assumption on the part of Congress that the principles governing the law of counterfeiting (which included an intent-to-defraud requirement) would most certainly apply.[5] The legislative history reveals:

- The provision was proposed by Treasury Secretary Salmon P. Chase "to guard against counterfeiting" and because he was "[t]hinking of the danger of counterfeits."[6]

- The only recorded statements on the floor of Congress were those of the bill's chief sponsors that the provision would "guard against counterfeiting."[7]

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[5]The statute was first enacted as Ch. 33, § 7, 37th Cong., 2d Sess., 12 Stat. 345, 347-48 (Feb. 25, 1862).

[6]Letter from S.P. Chase to Thaddeus Stevens (Feb. 3, 1862); Elbridge G. Spaulding, *History of the Legal Tender Paper Money Issued During the Great Rebellion* 26 (1869).

[7]Spaulding, *supra* at 98; John Sherman, *Recollections of Forty Years in the House, Senate and Cabinet* 290, 298 (vol. I, 1895).

— The very same Congress that enacted the provision stated in a later statute that its purpose was "to prevent and punish counterfeiting and fraud[]."[8] And,

— The law-enforcement officers charged with administering the provision in the era of its passage expressed the view that its purpose was "to suppress the counterfeiting of the paper money of the United States."[9]

Second, a statute must be construed, where fairly possible, to avoid potential constitutional problems unless "such construction is plainly contrary to the intent of Congress."[10] The lower courts did not even acknowledge this principle. But it applies with particular force to statutes that raise First Amendment concerns, where this Court has taught that statutes *must* be interpreted to avoid questions as to their constitutionality. *See, e.g., United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-68 (1994) (rejecting "most natural grammatical reading" of statute); *Frisby* v. *Schultz*, 487 U.S. 474, 483, 492 n.3 (1988) (adopting "rather strained" reading of statute); *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940). This case follows *a fortiori* from those, because other rules of statutory construction also require an interpretation of the statute as containing a scienter element.

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[8]Ch. 73, § 8, 37th Cong., 3d Sess., 12 Stat. 709, 713 (March 3, 1863).

[9]Letter from Lot M. Morrill to John Sherman (Jan. 15, 1877) and Letter from George F. Talbot to Lot M. Morrill (Jan. 15, 1877) (both *printed in* Ex. Doc. No. 19, 44th Cong., 2d Sess. (Jan. 17, 1877)); Letter from John Sherman to W.A. Wheeler (Jan. 16, 1878) (*printed in* Ex. Doc. No. 10, 45th Cong., 2d Sess. (Jan. 17, 1878)).

[10]*Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see Public Citizen* v. *Department of Justice*, 491 U.S. 440, 465-66 (1989) (collecting cases).

III. THIS COURT'S ATTENTION TO 18 U.S.C. § 504 IS WARRANTED

Absent some narrowing, a blanket strict-liability prohibition on possession of images of United States currency would be flatly unconstitutional. The Government contends that sufficient narrowing was accomplished in 18 U.S.C. § 504. We submit that, in light of modern computer technology, section 504 is no longer adequate to the task. Section 504 is a "safe harbor" exemption from liability under any counterfeiting provision for illustrations that meet certain size and color limitations.[11] In 1984, this Court confronted a facial challenge to sections 474 and 504 in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984). That case produced four opinions, none garnering a majority. They fill 64 pages of the United States Reports. The four opinions assumed that section 474 was a blanket restriction and left the status of the facial constitutionality of the size and color rules unsettled. Four members of the Court were of the view that the rules were "reasonable manner regulations that can be constitutionally imposed on those wishing to publish photographic reproductions of currency." 468 U.S. at 658-59 (footnote omitted). Four other members of the Court would have struck the statute down in its entirety. 486 U.S. at 691, 692. Finally, Justice Stevens refused to opine on the facial validity of the statute at all, explaining "while the statute might not have accommodated adequately the First Amendment rights of all individuals, if it has successfully avoided abridging Time's freedom of speech or press through the exception, Time has no stake in championing the rights of third parties regarding these issues." 468 U.S. at 694.[12]

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[11]The illustration must be less than 75% or more the 150% of the size of the genuine article and must be in black and white.

[12]Justice Stevens thus concurred in part and dissented in part: "The question for us, of course, is not whether Congress could have done a better job, but whether the job it did violates *Time's* right to free expression. It does not . . . . Accordingly, I concur in the judgment of the Court in part, and dissent in part." 468 U.S. at 704 (emphasis in original). Within the confines of that approach, of course, Time's complaint has little to do with that of Boggs, who asserts his own rights

Although application of the rules of statutory interpretation laid out above would avoid a finding of unconstitutionality, the record in this case establishes that changes in technology have eaten away at the underpinnings of the statutory scheme, so that it is no longer narrowly tailored to serve the Government's legitimate goal. A statute is not "narrowly tailored" if "a substantial portion of the burden on speech does not serve to advance the goals." *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991).

The statute as interpreted below violates that rule by covering a wide variety of speech that bears no risk of promoting counterfeiting or fraud. At least 86 million copies of popular magazines containing apparent "violations" were published in one recent six-month period. App. 55a. If the lower courts' interpretation of the statute stands, all 86 million of these magazines—and millions and millions of others published before and after—are "contraband" and their possession is unlawful. Similarly, a recent publicity campaign surrounding the newly redesigned currency involved many "violations" of sections 474 and 504 (as interpreted by the lower courts) published on the front pages of our nation's newspapers.[13] The statute also has a very significant chilling effect:

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as an artist to create obviously non-deceptive likenesses of the currency not falling within the narrow safe harbor. *See* App. 19a, 56a.

[13]*See, e.g.*, Charles R.T. Crumpley, "A New Look for Ben and Other Bills to Foil Counterfeiters," *Kansas City Star*, Sept. 28, 1995, p. A1 (color photo); John Schmeltzer, "We're In the Money; U.S. Launches Plan to Sell New $100 Bill," *Chicago Tribune*, Sept. 28, 1995, p. 1 (same); Ralph Varabedian, "Uneasy Money; U.S. Unveils $100 Note in Bid to Thwart Counterfeiters," *Los Angeles Times*, Sept. 28, 1995, p. D1 (same); "$100 Bill is Getting a Face Lift to Foil Cheats," *Greensboro News & Record*, Sept. 28, 1995, p. A1 (same); "$100 Bill's Face Lift Shown Off," *Houston Chronicle*, Sept. 28, 1995, p. 1 (same); "A More Current Currency," *Baltimore Sun*, Sept. 28, 1995, p. 1A (same); "Ben's $100 Bill Gets a Makeover," *Cincinnati Post*, Sept. 28, 1995, p. 1A (same); "Bigger Ben for $100 Bills," *Arizona Republic*, Sept. 28, 1995, p. A1 (same); "Cashing In: $100 Bill Remade," *St. Louis Post-Dispatch*, Sept. 28, 1995, p. 1A (same); Color Photo, *USA Today*, Sept. 28, 1995, p. 1A (same);

prudent lawyers will undoubtedly advise those clients who seek advice to steer well clear of any potential violation, because the penalties are simply too high. The statutory scheme therefore imposes a very substantial burden on legitimate speech.

At the same time, the statute no longer materially advances the Government's law-enforcement goals. In 1984, the plurality in *Time* deferred to the Government's assertion that negatives and four-color separations of images of currency were critical for the effective counterfeiter in the early 1980s and difficult to come by, so that allowing them to fall into the wrong hands could have had dangerous consequences. Therefore, four members of the Court opined that the size and color rules were facially valid, on the theory that they served the goal of making it "harder for counterfeiters to gain access to negatives that could easily be altered and used for counterfeiting purposes." *Time*, 468 U.S. at 657.

Today, alterations in size and color are no obstacle at all to the would-be counterfeiter: enlarging or reducing an image or changing its color takes only a few keystrokes on a computer. The Director of the Bureau of Engraving and Printing, which designs and produces United States currency, has testified before Congress that the difficulty of reproducing "color [is] an ineffective deterrent against today's high quality color copiers and computer scanners,"[14] and that new, narrowly tailored anti-counterfeiting measures "best respond to the threat" of counterfeiting.[15] The

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"Countering Counterfeiters," *Louisville (KY) Courier Journal*, Sept. 28, 1995, p. 17 (same); "Hot Off the Press; Left-Of-Center Franklin May Thwart Counterfeiters," *New Orleans Times-Picayune*, Sept. 28, 1995, p. C1 (same); "New $100 Bill Intended to Flatter Franklin, Foil Fakers," *Atlanta Journal & Constitution*, Sept. 28, 1995, p. E1 (same).

[14] *Redesign of the Currency: Hearing Before the House Comm. on Banking*, 103d Cong., 2d Sess. 88 (July 13, 1994) (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing).

[15] *U.S. Mint Authorization, The Bureau of Engraving & Printing & the U.S. Secret Service Counterfeit Division: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the House Comm. on Banking,*

new measures have now resulted in a significant and highly publicized redesign of the currency.[16] Surely these new measures are compelling evidence that the size and color rules are no longer an effective means for accomplishing the goal of preventing counterfeiting. Remarkably, the Government presented *no* evidence to the lower courts justifying the size and color rules.

The statute thus burdens a substantial amount of legitimate speech, while only peripherally—if at all—advancing the Government's law-enforcement goals. Even statutes furthering *legitimate* government interests that intersect with First Amendment rights must be narrowly tailored.[17] This statute does not meet that test. It is a blunt instrument left over from a bygone era.

Congress itself has recognized that section 504 is no longer narrowly tailored to prevent counterfeiting and has therefore directed the Secretary of the Treasury to promulgate regulations that "permit color illustrations" and to "establish a system to ensure that the legitimate use of . . . electronic methods and retention of . . . reproductions [of currency] by businesses, hobbyists, press or others shall not be unduly restricted." Pub. L.

Finance & Urban Affairs, 102d Cong., 1st Sess. 47 (Apr. 23, 1991) (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing).

[16]*See supra* p. 16 & n.13; *see generally* Robert E. Schafrik & Sara E. Church, "Protecting the Greenback," *Scientific American*, July 1995 at 40-46 (describing project to redesign currency).

[17]*See, e.g., United States* v. *NTEU*, 115 S. Ct. 1003, 1014-18 (1995) (striking down statute chilling speech of federal employees because government failed to show nexus between statute and government interest to be served); *Simon & Schuster, Inc.*, v. *New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991) (striking down statute not narrowly tailored to promote admittedly "compelling" government interest); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking down ordinance that only "peripherally" promoted admittedly "substantial" government interest).

102-550, Title XV, § 1554, 106 Stat. 3672, 4071 (1992) (codified at 18 U.S.C. § 504(1)(D) & (2) (Supp. V 1993)).[18]

IV. THE D.C. CIRCUIT'S INTERPRETATION OF § 474 CONFLICTS WITH THAT OF OTHER CIRCUITS

The lower courts followed cases stating that section 474 is a strict-liability felony,[19] even though the Government conceded that those cases were in error. Brief for Appellees 38. Other courts, including the Fifth, Eighth, and Eleventh Circuits, have held that the statute requires an intent to engage in counterfeiting or a similar unlawful purpose.[20] The Seventh and Ninth Circuits

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[18]Proposed regulations (*see* 60 Fed. Reg. 32929 (June 26, 1995)) would permit color illustrations only with quarter-inch "bold, black, block letters" reading "non-negotiable" and "prominently and conspicuously placed across the center portion." 60 Fed. Reg. at 32929-30. No regulations have been formally promulgated, and the propriety of those proposed is not before the Court.

[19]*United States* v. *Green*, 962 F.2d 938, 943 (9th Cir. 1992) ("proof of intent is not necessary"); *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969) (*dicta*) (following *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954) ("mere making of an impression . . . is a violation of the statute without proof of unlawful intent")); *Wagner* v. *Simon*, 412 F. Supp. 426, 430 (W.D. Mo. 1975) ("[p]laintiff's intent . . . is not a factor to be considered"); *Ex parte Holcomb*, 12 F. Cas. 328, 328 (C.C.D. Minn. 1871) ("intent, whether to use, or deceive, or defraud, has nothing to do with the crime").

[20]*United States* v. *Parr*, 716 F.2d 796, 808 (11th Cir. 1983) (defendant "intended to *use* the note to induce [an undercover agent] to purchase large quantities of [counterfeit] notes. Such intent to use for unlawful purposes clearly falls within the scope of 18 U.S.C. § 474."); *Britt* v. *United States*, 391 F.2d 540, 541-42 (5th Cir. 1968) ("requisite criminal intent" under section 474 is "intent to commit the offense of counterfeiting"); *Michener* v. *United States*, 157 F.2d 616, 620 (8th Cir. 1946) (under § 474, "possession would be innocent were it not possessed with intent to use . . . in counterfeiting"), *rev'd on other grounds*, 331 U.S. 789 (1947); *United States* v. *White*, 27 F. 200, 203 (C.C.E.D. Mo. 1886) (same for predecessor to 18 U.S.C. § 481, which parallels section 474 for

have suggested that a "knowing" state of mind is sufficient.[21] Although it did not acknowledge it, the D.C. Circuit has set itself in conflict with these courts. In addition, similar statutes whose text does not contain an intent element have long been held to require one anyway. The most familiar example is 18 U.S.C. § 495, which prohibits false making, alteration, forgery, and counterfeiting "for the purpose of obtaining" money from the United States in certain cases. The cases hold that conviction under any clause requires a *fraudulent* state of mind, even though only two of the three clauses expressly require an intent to defraud.[22] The D.C. Circuit's strict-liability standard is in conflict with these decisions, as well.

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obligations of foreign governments); *see also United States* v. *Turner*, 586 F.2d 395, 399 (5th Cir. 1978) (upholding conviction where defendant "had the requisite criminal intent"); *Pawley* v. *United States*, 73 F.2d 907, 907 (9th Cir. 1934) (prosecution for violation of section 474's predecessor with intent to "use . . . in forging and counterfeiting"); *Litofsky* v. *United States*, 9 F.2d 877, 878 (2d Cir. 1925) (same); *United States* v. *Weber*, 210 F. 973, 975 (D. Wash. 1913) (same "with intent to use . . . and thereby defraud"); *United States* v. *Fitzgerald*, 91 F. 374, 375-76 (N.D. Wash. 1898) (jury acquitted after the court instructed that "[t]he intent must be a criminal intent," and "you must acquit the defendant, unless you find that he had the guilty intent that I have spoken of").

[21] *United States* v. *Kenney*, 5 F.3d 214 (7th Cir. 1993); *see also United States* v. *Green*, 962 F.2d 938, 943, 944 (9th Cir. 1992) (holding statute a strict-liability felony, but approving District Court's jury instruction requiring knowing state of mind).

[22] *See, e.g.*, *United States* v. *Hester*, 598 F.2d 247, 248 & n.4 (D.C. Cir. 1979); *United States* v. *Bates*, 468 F.2d 1252, 1255 (5th Cir. 1972); *United States* v. *Sonnenberg*, 158 F.2d 911, 915 (3d Cir. 1946); *Staton* v. *United States*, 88 F. 253, 255 (8th Cir. 1898); *see also United States* v. *Price*, 795 F.2d 61, 63 (10th Cir. 1986); *United States* v. *Massey*, 629 F.2d 1084, 1086 (5th Cir. Unit A 1980), *cert. denied*, 450 U.S. 969 (1981); *United States* v. *White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980); *United States* v. *Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969).

The Court of Appeals made no effort to reconcile its decision with any of these cases. Its only explanation (App. 3a) for its holding was a one-line statement that interpreting section 474 as something other than a strict-liability felony would render it "duplicative" of 18 U.S.C. §§ 471 and 472. The Government did not make that argument, presumably because it recognized that section 471 prohibits counterfeiting, section 472 prohibits passing counterfeits, and section 474 is directed at the tools of the counterfeiter. Interpreting this last provision to carry with it an appropriate level of criminal intent would therefore not render the other provisions duplicative at all. Each is directed at different operative behavior. If the Court of Appeals were correct, then sections 471 and 472 *themselves* would be duplicative, and all counterfeiting prosecutions could proceed under section 474 without any proof of *scienter*. This would, of course, be a radical change in the law of counterfeiting.

* * * *

In sum, the decisions below place millions of persons in violation of a strict-liability felony in exercising their First Amendment rights, allowing the Government to pick and choose almost anyone to harass or prosecute. In this case, they chose Boggs for harassment; and the lower courts have held that they may. To reach that remarkable holding, the courts below had to ignore both the "background assumption of our criminal law" that *scienter* is required and the principle that the federal courts will construe a statute to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress. Those courts also ignored fundamental changes to technology that have rendered the constitutional justification for the statute obsolete, and the D.C. Circuit has set itself in direct conflict with the rule in other circuits.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 95-5100

J.S.G. BOGGS,

Appellant,

v.

ELJAY BOWRON, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

[Filed October 12, 1995]

[Judgment Entered October 12, 1995]

JUDGMENT

Before: BUCKLEY, GINSBURG, AND TATEL,
Circuit Judges

Appellant J.S.G. Boggs appeals from the District Court's entry of summary judgment in the Appellee's favor. Boggs sought a declaratory judgment either that his artwork does not violate 18 U.S.C. § 474, or that, if it does, the statute violates his right to free speech under the First Amendment of the United States Constitution. He also seeks an injunction against further investigation and prosecution.

Having considered the record from the United States District Court for the District of Columbia and the briefs and argument of

counsel, the panel AFFIRMS the judgment of the District Court, substantially for the reasons set forth at 842 F. Supp. 542 (1993), and for the reasons stated in the attached memorandum opinion

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41(a)(2). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

MEMORANDUM

In the District Court, Boggs asked for a declaration "that the counterfeiting statutes do not apply to plaintiff's artistic work or, in the alternative, that 18 U.S.C. §§ 474 and 504 are unconstitutional as applied and on their face." Jt. App. at A19 (Complaint). On appeal, Boggs offers two arguments in support of the first alternative. First, he says that convictions under the fifth and sixth paragraphs of § 474 require proof of fraudulent intent, and that he has none. Convictions under these paragraphs, however, do not require proof of fraudulent intent. Construing the statutes as Boggs suggests would render them duplicative of §§ 471 and 472 and is required neither by *Morissette* v. *United States*, 342 U.S. 246 (1952), nor by *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

Second, Boggs says that we must consture the "likeness" requirement in the sixth paragraph of § 474 as identical to the "similitude" requirement in the fifth paragraph, and that the several samples he presented here and to the District Court would not support a jury finding of similitude. We need not reach either of these issues, however, because the most favorable ruling we could make would not give him the relief he has requested, viz. a declaration that the statute does not apply to his work generally and an injuction that would protect him from prosecution for works in the same genre that he might produce in the future, or has already produced but not submitted for review. Jt. App. A18-19 (Complaint). At best, Boggs could obtain a ruling that specific items now extant would not support a finding of similitude. His apparent failure to seek clarification from the District Court as to which

pieces that court had determined were adequate to support a conviction, however, and his patent failure to ask this court for piece-by-piece review of all items considered by the District Court—not only the samples that Boggs submitted, but also the 15 samples submitted by the Government—confirm that he is not seeking a piecemeal ruling here but only one that would support his request for broad declaratory and injunctive relief.

To hold merely that certain examples of Boggs' work would not support his conviction under § 474 would not shelter Boggs from continued Secret Service scrutiny and even prosecution. Perhaps, based upon the few pieces we have seen, the court could craft some standard to guide Boggs and the Service, but Boggs has not asked for such relief—not here, and not in the District Court—and we have not had the benefit of argument concerning or record evidence bearing upon how we might best go about the task, let alone whether we ought to do so.

Boggs' claim for return of seized property is still pending in the District Court. *Boggs* v. *Bowron*, Order of March 28, (D.D.C. 1995) (striking the last sentences in footnote 20 of the Memorandum Opinion of December 9, 1993). Should the District Court determine that any of the seized items is contraband, that ruling will be reviewable in a subsequent appeal.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1845

J.S.G. BOGGS,

Plaintiff,

v.

ELJAY BOWRON,[1] *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiff, a visual and performance artist, challenges the constitutionality of provisions of the federal anti-counterfeiting statutes, requesting declaratory and injunctive relief.[2] Defendants[3]

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[1]This case was originally brought against John W. Magaw, in his capacity as Director of the United States Secret Service. On December 7, 1993, Eljay Bowron became Director of the Secret Service. "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, . . . the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party . . . ." Fed. R. Civ. P. 25(d)(1). This court hereby orders substitution of the aforementioned party.

[2]No one in this case questions the power of Congress to regulate counterfeiting activities. As the Supreme Court has stated:

> The Constitution expressly empowers congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States. U.S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted [several] statutes that together

have filed a motion to dismiss, and the parties have filed cross-motions for summary judgment. For the reasons stated below, defendants' motion for summary judgment is granted.[4]

I. *Introduction*

J.S.G. Boggs is an artist and academic.[5] His work has been exhibited throughout America and Europe and is currently on exhibit under the auspices of the Smithsonian Institution. Mr. Boggs' work has been the subject of wide-spread media attention.[6] This notoriety is due, in part, to the fact that much of Mr. Boggs' work is in the "image of money." *See* Complaint for T.R.O., Prelim. & Perm. Inj., & Other Relief ("Complaint") ¶ 4; Aff.

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restrict . . . reproductions of currency."

Regan v. *Time, Inc.*, 468 U.S. 641, 643 (1984) (citation omitted).

[3]Defendants are various United States government oficials who are statutorily charged with the administration and enforcement of the counterfeiting laws of the United States. Lloyd M. Bentsen is Secretary of the United States Department of the Treasury, responsible for the enforcement of the laws of the United States which define, and provide for the punishment of, counterfeiting and forgery of United States currency. Eljay Bowron is Director of the Unites States Secret Service, a division of the Department of the Treasury, and is responsible for the detection and arrest of persons who violate federal counterfeiting laws. Janet Reno is the Attorney General of the United States, responsible for the administration of the United States Department of Justice, including its activities with respect to the nation's penal laws.

[4]This court has already denied plaintiff's Motion for Temporary Restraining Order after a hearing on September 3, 1993 by Order dated September 7, 1993.

[5]Mr. Boggs is presently a Fellow of Art and Ethics at Carnegie Melon University. Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 2.

[6]Indeed, Mr. Boggs' work has been featured in numerous prestigious newspapers and artistic journals, television news features, and even a documentary film entitled *The Money Man.*

Boggs ¶ 6. Many are actual-sized, *trompe l'oeil* pieces.[7] *Id.* ¶ 6; Boggs Aff. ¶ 3. After explaining to merchants that he is an artist, Mr. Boggs then barters these pieces, offering to exchange his art for the face value of the reproduction in goods and services.[8] Boggs has "spent" thousands of pictures of currency ("Boggs Bills") around the world over the last eight years. *Id.*[9]

The purpose behind Boggs' approach to art does not appear to

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[7]"*Trompe l'oeil*" means "fool the eye."

[8]Collectors of Mr. Boggs' work do not simply buy a Boggs Bill. They contact the artist, not to buy the work from him, but rather to get information about where they can go to purchase "the transaction." Mr. Boggs supplies the item for which he bartered, the receipt for the items bartered, the change from the exchange, and the name and address of the person in possession of the Boggs Bill. The collector purchases the Boggs Bill from a holder, usually for far more than the face value of the Boggs Bill or the value given by the holder in exchange for the bill. Then the collector again contacts Mr. Boggs for help in displaying the complete transaction in a framed display.

For example, in *The Money Man*, Boggs convinced a hotel to accept his Boggs Bills in exchange for his account during his stay at the hotel. The hotel then had Boggs create an artistic display for their lobby, featuring the transaction. Boggs framed the papers evidencing his hotel debt, the change he received from the hotel (the face value of the Boggs Bill—the hotel fee), and something representative of his visit to the hotel, the bath robe he used during his stay.

[9]Mr. Boggs inadvertently began creating illustrations of money. While attending a 1984 Art Expo, Boggs "found himself in a diner having a doughnut and coffee while doodling on a napkin." Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 8. While embellishing the numeral one on a napkin, a waitress asked to buy "the most beautiful dollar" she had ever seen. *Id.* Boggs declined, but allowed the waitress to accept it as payment for the 90 cent meal. In exchange, the waitress insisted on giving a dime in change. *Id.* Boggs framed this dime and embarked on his current approach to art.

be to defraud those with whom he barters.[10] As he states:

> I have brought art out of the museum and into the street. I explore issues of trust, value, aesthetic beauty and questions about the usefulness and value of art—all in a dialogue *with* the viewer, rather than in a monologue directed *at* the viewer. In proposing a transaction, I generally ask a series of questions designed to prompt the viewer into thinking about the meaning and uses of art and money in everyday life. My art allows me to ask the viewer, directly, what art should look like, what should be done with it, and what it represents. In part, my work is designed to elucidate the idea that the value of money . . . should be consciously accepted on the basis of our trust in each other and in our social and political institutions. My work allows art . . . to reach people who cannot be coaxed into galleries and museums.

Boggs' Aff. ¶ 7-8.

An unlikely collector, the Secret Service has taken a keen interest in the work of Mr. Boggs. In September 1990, Secret Service agents effectively stopped the publication of a catalog featuring Mr. Boggs' work. When Secret Service agents seized the color proofs for the catalog, they informed the printing company that the publication of Boggs' work, in their actual dimensions and in full color, would be in violation of the counterfeiting statutes. Compl. ¶ 9. The United States Attorney in Florida did not bring charges. *Id.* ¶ 10.

In March 1991, reports of Mr. Boggs' attempting to obtain merchandise from a local store using a reproduction of United

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[10]Boggs asserts that he is "careful not to make his work look so 'real,' however, that an ordinary person of average intelligence cannot immediately and readily distinguish between Boggs Bills and genuine currency." Plf. Mot. Summ. J. ¶ 4. Boggs vehementaly denies the label counterfeiter but concedes that in the past individuals have counterfeited his reproductions, Ex.3, Defs.' Mot. Dismiss.

States currency prompted a visit from the Secret Service in Cheyenne, Wyoming. *Id.* ¶ 11. A Secret Service special Agent and the United States Attorney for the District of Wyoming visited Boggs in his hotel room. At their request, Boggs provided a general sample of 15 Boggs Bills.[11] Boggs was advised that his reproductions appeared to be in violation of the counterfeiting statutes and were subject to seizure. This sample is being retained by the Secret Service as contraband. Defs.' Mot. Dismiss at 4. On October 4, 1991, the office of the United States Attorney for the District of Wyoming declined prosecution of Boggs. Compl. ¶ 12.

In September 1992, the Pittsburgh area Secret Service was alerted to Boggs' attempts to use his reproductoins in the Pittsburgh area. *Id.*, Abraham Aff. ¶ 2. Boggs contacted the Pittsburgh Field Office by telephone and voluntarily appeared for an interview on October 1, 1992. During the interview, Boggs would not produce any other samples. The Secret Service provided Mr. Boggs with a pamphlet explaining the guidelines for reproducing currency; however, Mr. Boggs stated that he was familiar with the guidelines, but did not believe they applied to his work. *Id.* ¶ 5.

In November 1992, a press clipping alerted the Secret Service to the fact that Boggs had printed one million dollars in Boggs Bills and was planning to use the notes in the Pittsburgh area during the next year. *Id.* ¶ 7-8. On December 1, 1992, after consultation with the United States Attorney's Office for the Western District of Pennsylvania, the Secret Serivce obtained federal search warrants for the residence, studio, and office of Boggs. The Service seized several items, characterized by Boggs as the bulk of his life's work, pursuant to the properly executed warrants. Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 2, 11. In a December 8, 1992, meeting with agents of the Secret Service, Boggs was advised that his reproductions were in violation of the statute and that he could be prosecuted for his actions if he continued. Compl., Abraham Aff. ¶ 10.

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[11]"Despite repeated requests, the Secret Service has not returned the art to Boggs." *Id.* ¶ 12. They were retained by the Secret Service as contraband. Henson Decl. at ¶ 9.

On February 8, 1993, the United States Attorney for the Western District of Pennsylvania sent a cease and desist letter to Boggs, stating that continued reproducing and passing of Boggs Bills could subject him to prosecution. The letter expressed that the Service viewed his "continued manufacture, possession and distribution of 'Boggs bills' as a violatoin of the law." The United States Attorney's Office is currently considering whether it will prosecute Mr. Boggs in Pennsylvania.[12]

On May 25, 1993, Boggs attempted to resolve the matter through administrative means. He petitioned the Secretary of the Treasury pursuant to 18 U.S.C. § 504 for permission to continue his reproduction and distribution of Boggs Bills. Compl., Ex. A.[13] Prosecutors agreed to refrain from taking steps to indict Boggs pending the decision by the Secretary. Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 3. On September 2, 1993, Boggs' petition was denied by the Secret Service. *Id.*, Ex. B. On September 3, 1993, Boggs initiated the current proceeding.[14]

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[12]This court, however, requested and received assurances from the United States Attorney's Office for the Western District of Pennsylvania that they would not prosecute Mr. Boggs pending decision on the pending motions in this case.

[13]Under 18 U.S.C. § 504, the Treasury Department may authorize reproductions of currency. The section states:

> (2) The provisions of this section shall not permit the reproduction of illustrations of obligations or other securities, by or through electronic methods used for the acquisition, recording, retrieval, transmission, or reproduction of any obligation or other security, *unless such use is authorized by the Secretary of the Treasury.* The Secretary shall establish a system to ensure that the legitimate use of such electronic methods and retention of such reproductions by businesses, hobbyists, press or others shall not be unduly restricted.

18 U.S.C. § 504(2).

[14]Mr. Boggs has been the subject of numerous lawsuits in other

II. *Motion to Dismiss for Failure to State a Claim*

A. *Standard of Review*

Before reaching the merits of plaintiff's claims, however, the court must address its jurisdiction over this matter. Defendants suggest that the complaint should be dismissed for failure to state a claim for equitable relief. When reviewing the adequacy of a complaint for purposes of a Rule 12(b)(6) motion, plaintiff's factual allegations must be presumed true and liberally construed in favor of the plaintiff. *Phillips* v. *Bureau of Prisons*, 591 F.2d 966, 968 (D.C. Cir. 1979) (citing *Miree* v. *Dekalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977)). In addition, the plaintiff must be given every favorable inference that may be drawn from his allegations of fact. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." 2A *Moore's Federal Practice*, § 12.07 at 63 (2d ed. 1986) (footnote omitted); *see Haynesworth* v. *Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987) (citing *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960)).

Dismissal is only apropriate if it appears beyond doubt that no set of facts proffered in support of plaintiff's claim would entitle him to relief. *Haynesworth*, 820 F.2d at 1254 (citations omitted); *Phillips*, 591 F.2d at 968.

B. *Reaching the Merits of this Case*

Plaintiff asks this court to enjoin the ongoing criminal investigation and possible future criminal prosecution in the Western District of Pennsylvania on constitutional grounds. Compl. at 10. The question is whether this court should reach the merits of this case. Defendants suggest not. After considering the extraordinarily well-written pleadings and memoranda of all parties, this court believes

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countries. In England and Australia, Mr. Boggs was unsuccessfully prosecuted. In London, Mr. Boggs was acquitted by a jury; in Sydney, the judge threw out the case before trial. Ex. A.

that it may hear the merits of this request for injunctive relief under the Declaratory Judgment Act, the equities of the situation at hand requiring this court to provide a forum for plaintiff's complaint.[15]

The Declaratory Judgment Act states:

> (a) *In a case of actual controversy within its jurisdiction,* except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, *any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.* Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2201 (West Supp. 1993) (emphasis added).

Under the Declaratory Judgment Act, the court must have before it "a case of actual controversy within its jurisdiction." This phrase has often been interpreted as synonymous with the "case or controversy" requirement of Article III of the Constitution. "[C]oncrete legal issues, presented in actual cases, not abstractions" are required for adjudication of legal disputes. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940); *see also Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 443 (1938).[16] "Basically, the

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[15]This court has original jurisdiction pursuant to 28 U.S.C.A. § 1331 (1933).

[16]Although 28 U.S.C. § 2201 authorizes the court to declare the rights of the parties before it, the statute permits no relief which is not "conso-

question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

In order for a party to seek preenforcement review of a statute, the dispute must also be ripe for adjudication. 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2757 (1983). For example, a plaintiff can usually challenge the legality of a statute only when he or she is prosecuted for its violation. Then, the plaintiff can raise a defense that the law is unconstitutional.

However, a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson*, 425 U.S. 452, 459 (1974). *Threats* of criminal prosecution may provide a basis for adjudication. *Id.* A plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). Indeed, civil actions for declaratory relief against criminal prosecution have become a common method of challenging the constitutionality of federal statutes. Moreover, courts have not hesitated to restrain or enjoin criminal prosecutions where First Amendment rights are at stake. *PHE, Inc.* v. *Department of Justice*, 743 F. Supp. 25, 26 (D.D.C. 1990).

As Wright, Miller, and Kane explain:

> [C]ourts have declined to hear cases seeking a declaratory judgment on the constitutionality of a particular statute . . . when plaintiff has not shown that there is any immediate threat that the statute will be enforced against him. But,

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nant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

> courts also have not hesitated to issue a declaration if "one or both parties have taken steps or pursued a course of action which will result in "'imminent' and 'inevitable' litigation . . . ." Thus, when the threat of prosecution under a challenged statute is real, a declaratory judgment on the constitutionality of the statute is appropriate.

10A Wright, Miller, & Kane, *supra*, § 2757 (footnotes and citations omitted). Inherent in this rule of law is that there is an unfairness to requiring a person to violate a law in order to challenge it.

In considering whether to entertain a case, a court should consider the hardship to the parties in withholding court consideration and the significance of the harm in denying review. These factors must be weighed on a case-by-case basis,[17] construing the Declaratory Judgment Act liberally so as to effectuate its broad, remedial purpose.

Because the separation of powers doctrine dictates substantial deference with respect to prosecutorial decision-making in investigations and prosecutions, there is a strong policy against intervening in ongoing criminal investigations. *North* v. *Walsh*, 656 F. Supp. 414, 420 (D.D.C. 1987). The standard of obtaining any form of injunctive relief is high, but a party who seeks to enjoin a criminal investigation has a particularly heavy burden. *Id.* Our Court of Appeals has denied such equitable relief, ruling that "only the most extraordinary circumstances warrant anticipatory judicial involvement in crimminal investigations." *Id.* (citing *Reporters Committee for Freedom of the Press* v. *AT&T*, 593 F.2d 103, 1065 (D.C. Cir. 1978), *cert. denied* 440 U.S. 949 (1979)). In addition, the Supreme Court has routinely rejected collateral challenges which impede ongoing criminal investigations.

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[17] "It is "well settled by a multitude of cases that the granting of a declaratory judgment rests in the sound discretion of the trial court exercise in the public interest." 10A Wright, Miller, & Kane, *supra*, § 2759.

The rationale is threefold. First, courts must protect the public's interest in the fair and expeditious enforcement of the criminal laws. Second, courts should balance the defendant's need to assert his rights against the judiciary's interest in conserving its resources. And third, principles of separation of powers caution courts against intervening in a criminal investigation conducted by another branch of government. *Id.*

Despite the caution which a court must exercise in deciding whether to hear the merits of a declaratory action to enjoin a criminal prosecution, Mr. Boggs is involved in a controversy ripe for adjudication. Having exhausted his administrative remedy, Mr. Boggs has pursued a course of conduct that will result in inevitable litigation.[18] There is no question that Mr. Boggs and the Secret Service have "adverse legal interests." This court believes these interests are of "sufficient immediacy and reality" to warrant adjudication.

Mr. Boggs is also justified in his well-founded fear of prosecution. Boggs has received numerous warnings emanating from the Treasury Department. *See supra* Part I. Plaintiff has been told that if he does not cease and desist "from the use of any future reproductions of currency appearing in color," the matter will be turned over to the United States Attorney for "appropriate action."

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[18]Defendants provide adequate evidence of Mr. Boggs' situation. The Declaration of Special Agent Thomas M. Abraham states:

> On December 8, 1992, I interviewed Mr. Boggs at his request in the presence of two Assistant United States Attorney's [sic] in Pittsburgh. Mr. Boggs indicated that he was was [sic] an artist and not a counterfeiter, and that he would continue to make and pass "Boggs Bills." Boggs was advised that his reproductions were in violation of the statute and that *he could be prosecuted for his actions if he continued. Mr. Boggs stated that he understood these violations, but they do not relate to him or his work. He continued that he will draw and pass these bills even if he would be sent to prison.*

Decl. Abraham § 10 (emphasis added).

The United States Attorney has never disavowed the possibility of prosecution. *See supra* footnote 10.

"The absence to date of prosecutorial action with respect to plaintiff does not diminish or lessen the immediacy and ripeness of this controversy: '[c]ontingency of official enforcement of clearly applicable criminal prohibitions should not be grounds for denying present review, even if there is no demonstrated threat of prosecution.'" *Time, Inc.* v. *Regan*, 539 F. Supp. 1371, 1382 (S.D.N.Y. 1982), *aff'd in part and rev'd in part* 468 U.S. 641 (1984) (citations omitted).

In addition, Mr. Boggs is being injured by the Secret Service in a number of ways other than threat of prosecution. Not only has the Secret Service seized his work, but also Mr. Boggs finds himself unable to sell his art. Fear of Secret Service seizure has also caused the artists' cooperative where Boggs lives to stop accepting his work. Boggs Aff. § 15. Collectors and gallery owners who would like to show or buy Boggs' work are also fearful of Secret Service intervention. *See* Sam Berkowitz Aff.

In *Wagner* v. *Simon*, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd* 534 F.2d 833 (8th Cir. 1976), the court reached the merits of a declaratory relief claim in a case with facts strikingly similar to the present case. Plaintiff requested that the court declare that a "work of art" that he created by using a photographic enlargement of a fifty dollar Federal Reserve note, which was seized by agents of the United States Secret Service under the provisions of section 474, was not within the scope of the counterfeiting statutes, and to declare that section 474 of that statute was unconstitutional or unconstitutional as applied to plaintiff. *Id.* at 428.

Plaintiff created a black and white enlargement from a negative of the federal reserve note, and modified the bill, creating images within the currency reproduction that expressed criticism of President Nixon's economic policies and his involvement in the Watergate scandal. *Id.* The court held that the "seizure of the facsimile by the Secret Service and the threats of criminal prosecution have effectively prevented plaintiff from marketing and displaying reproductions of the facsimile." The court noted that

these facts were sufficient to satisfy the case or controversy requirement of Article III. *Id.* at 430.

Defendants also assert that Rule 41(e) of the Federal Rules of Criminal Procedure provides an adequate remedy at law for the violation of Boggs' First Amendment rights. Rule 41(e) involves the return of *property* held by or on behalf of the Court. While the return of plaintiff's property is important, it is not a substitute for declaratory and injunctive relief vindicating his constitutional rights. Moreover, Rule 57 provides that "another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Fed. R. Civ. P. 57. The language in the Declaratory Judgment Act itself establishes beyond doubt that declaratory relief is alternative and not exclusive.[19]

III. *Motions for Summary Judgment on Injunctive Relief*

The court will now address the parties' cross-motions for summary judgment. Since both motions raise the same issues, the court will consider the two motions simultaneously.

In his quest for declaratory and injunctive relief, plaintiff contends that 18 U.S.C. §§ 474 and 504 prohibit plaintiff from using illustrations or likenesses of Unites States currency as vehicles for the expression of opinions and ideas in violation of his First Amendment rights. Plaintiff contends that these provisions are overly broad and curtail plaintiff's right of free speech, constituting unconstitutional censorship of his work. Plaintiff suggests that these statutes are unconstitutional on their face, and as applied to the activities of plaintiff. Plaintiff argues against the existence of any compelling governmental interest justifying the need for the constraints placed upon his symbolic use of illustrations of money. Plaintiff also states that the challenged provisions are not narrowly tailored so as to advance any constitutionally cognizable compelling governmental interest that may exist without

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[19]The rule states that a party may seek a declaration of its rights "whether or not further relief is or could be sought."

unnecessary abridgement of First Amendment rights.[20] Finally, plaintiff suggests that the statutory provisions do not apply to his work.

Plaintiff requests the court to (1) enjoin defendants from (a) prosecuting plaintiff or taking or taking action to prosecute him under 18 U.S.C. §§ 471-509, (b) taking action to interfere with plaintiff's artistic work, and (c) damaging or destroying his possessions; (2) direct defendants to return all property that was seized by the Secret Service; and (3) award compensatory damages to plaintiff for interference with and injury to his property. Compl. at ¶¶ 10-11.

The defendants contend that sections 474 and 504 constitute reasonable time, place, and manner restrictions upon free speech. Defendants suggest that the goals of these provisions are to prevent

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[20]In his original complaint, Boggs suggested that his work that was seized and destroyed by the Secret Service. He requested the return of his property, claiming that defendants violated his rights under the Due Process Clause of the Fifth Amendment. Compl. ¶¶ 26-32. However, defendants denied that any of Mr. Boggs' work had been destroyed, noting that the Boggs Bills were being held as contraband. Indeed, defendants contend that they asked plaintiff on several occasions to list property he believed to be lost or destroyed. Abraham Aff., ¶ 12. It appears that plaintiff abandoned this argument following assurances from the government that his art had not been destroyed.

As noted in the memorandum supporting defendants' motion for summary judgment, it appears that plaintiff has abandoned his Fifth Amendment claim:

> This became clear when plaintiff failed to dispute defendants' assertion that it had been abandoned in plaintiff's opposition to defendants' motion to dismiss. It is further supported by the fact that plaintiff's motion for summary judgment exclusively addresses the first claim in plaintiff's Complaint, his First Amendment claim.

Defs.' Mem. Mot. Dismiss at 1 n.1.

counterfeiting and to preserve and maintain the integrity of the currency system of the United States. Defendants argue that they are constitutional facially and as applied to plaintiff. The government suggests that they have tailored minimal restrictions aimed at the manner or style in which money is illustrated rather that to the content of illustrations of United States currency. They maintain that the First Amendment does not guarantee to plaintiff the right to illustrate money as a symbol in precisely the manner plaintiff happens to consider most effective. Defendants also challenge the existence of any case or controversy between plaintiff and defendants.

A. *Standard of Review*

A district court may grant summary judgment if it is clear that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate only if "the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Washington Post Co.* v. *U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Rule 56(c) dictates that "the mere existence of some alleged factual dispute between the parties shall not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original). For purposes of evaluating a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party. *Id.* (citations omitted).

B. *The Merits of the Summary Judgment Motions*

1. *Constitutional Challenges to the Statutes*

This court now faces a task similar to the one the Supreme Court faced in the case of *Regan* v. *Time, Inc.* 468 U.S. 641 (1984). In that case, Time, Inc., the publisher of several popular magazines, challenged the validity of sections 474 and 504. Over the course of many years, Time, Inc. was advised by Secret

Service agents that particular photographic reproductions of currency appearing in its magazines violated these provisions. Nevertheless, Time continued to use the reproductions. *Id.* at 646. The cover of the February 16, 1981, issue of Sports Illustrated featured a color photographic reproduction of $100 bills pouring into a basketball hoop. The Secret Service informed Time that the illustration violated federal law. The Service demanded seizure of all plates and materials used in connection with the production of the cover. The Service also requested the names and addresses of all involved in the preparation of the cover. Time initiated a suit remarkably similar to the present action, seeking a declaratory judgment that sections 474 and 504 were unconstitutional on their face and as applied to Time, as well as an injunction preventing the defendants from enforcing or threatening to enforce the statutes. *Id.*

In the plurality opinion of the Court, authored by Justice White, the Court determined that the "purpose" clause of section 504 was unconstitutional, failing as a valid time, place, and manner regulation because it discriminated on the basis of content. *Id.* at 648. Nevertheless, the Court found neither section 474 nor the entirety of section 504 to be unconstitutional on its face or as applied to Time, Inc. *Id.* at 659.

However, that decision is not dispositive on all of the issues raised in the present case. Moreover, since the decision in *Regan*, section 504 has been rewritten by Congress in an attempt to remedy the unconstitutional portions of the statute struck down by the Supreme Court's pronouncement. Today, this court reviews the current statutory provisions to determine whether they can survive constitutional scrutiny on their face or as applied to Boggs.

As a threshold matter, a court should determine whether the speech at issue is covered by the First Amendment. *Time, Inc.* v. *Regan*, 539 F. Supp. at 1382-83. In so doing, the court "must look to the content of the expression." *Id.* at 1383 (citations omitted). "The image of money is a powerful, expressive symbol, of significant value" in the communication of ideas. *Id.* "It is, to state the obvious, a particularly effective symbol for the communication of ideas about money itself." *Id.* It clear that plaintiff uses

his illustrations of money to illustrate and question "the meaning and uses of art and money in everyday life." Boggs' Aff. ¶ 7. Boggs' use of illustrations of money are "intimately related to the expression and communication of [his] ideas." *Time, Inc.* v. *Regan*, 539 F. Supp. at 1383. The publication or printing of illustrations of United States currency is protected speech under the First Amendment of the Constitution. Therefore, Mr. Boggs has a First Amendment right to create illustrations of United States currency absent constitutionally permissible overriding considerations.[21]

Plaintiff challenges the constitutionality of the statutes at issue

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[21]It is well settled that "freedom of expression" does not cover all modes of communication of ideas by conduct. *United States* v. *O'Brien*, 391 U.S. 357, 375 (1968). Where speech and nonverbal elements combine to form conduct, "incidental limitations on First Amendment freedoms may be justified where there is a sufficiently important governmental interest in regulating the nonspeech elements of that course of conduct." *Id.* at 376. The First Amendment values must be balanced against competing societal interests.

Mr. Boggs' work can be viewed in one of two ways. First, the transaction itself can be viewed as the conducty. As Boggs states about his first transaction that inspired him to create Boggs Bills:

> [This transaction] and others like it have become, for me, a means of achieving my goals as an artist. I have brought art out of the museum and into the street. . . . All in a dialogue with the viewer, rather than in a monologue directed at the viewer. . . .

Boggs Aff. ¶ 7. Thus, his work encompasses the act of bartering itself. Second, Boggs' work can be viewed as simply the Boggs Bill itself. This can also be viewed as the use of "symbolic" or "expressive" speech, and not pure speech.

Regardless of how one views Mr. Boggs' work, and the exact tag given its mode of speech, the statutory scheme must equate to a reasonable manner restriction as discussed *infra*. All the elements of the *O'Brien* test are subsumed under the test as a reasonable manner restriction.

in this case. Plaintiff bears a heavy burden in seeking to have sections 474 and 504 declared unconstitutional on their face. As the Supreme Court stated in *United States* v. *Salerno*,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

481 U.S. 739, 745 (1987). Moreover, a statute carries a presumption of constitutionality. *North* v. *Walsh*, 656 F. Supp. 414, 420 (D.D.C. 1987).

"Because of the interrelationship of sections 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem." *Time, Inc.* v. *Regan*, 539 F. Supp. at 1385. Criminal liability is only imposed under section 474 when a likeness of United States currency fails to meet the requirements imposed by section 504.[22] The exceptions in section 504 apply

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[22]The relevant text of § 504 states:

§ 8. Printing and filming of United States foreign obligations and securities

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the united States, and

(D) postage stamps, revenue stamps, notes, bond, and any other obligation or other security of any foreign government, bank, or corporation.

Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions-

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government and stamps issued under the Migratory Bird Hunting Stamp Act of 1934 may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color and illustration so f stamps issued under the Migratory Bird Hunting Stamp Act of 1934 in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimensions, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.

(2) The provisions of this section shall not permit the reproduction of illustrations of obligations or other securities, by or through electronic methods used for the acquisition, recording, retrieval, transmission, or reproduction of any obligation or other security, unless such use is authorized by the Secretary of the

"notwithstanding any other provision of this chapter," including section 474. "Thus, if the restrictions imposed by § 504 sufficiently accommodate . . . First Amendment interests, both statutes must be upheld." *Regan* v. *Time, Inc.*, 468 U.S. 641, 647 (1984). This court therefore begins with an analysis of the restrictions imposed by section 504.

In *Regan*, the government attempted to justify the restrictions imposed by section 504 as a reasonable time, place, and manner regulation.[23] Under that statutory scheme, a person could create

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Treasury. The Secretary shall establish a system to ensure that the legitimate use of such electronic methods and retention of such reproductions by businesses, hobbyists, press or others shall not be unduly restricted.

18 U.S.C.A. § 504 (West Supp. 1993).

[23]In full, pre-1984 § 504(1) provided:

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank or corporation for philatelic, numismatic, educational, historical, or newsworthy purposes *in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or*

illustrations of currency if the reproductions met the purpose, publication, color, and size requirements set out in section 504(1). Under the "purpose" clause, one could create an illustration of currency if made for "philatelic, numismatic, educational, historical, or newsworthy purposes." According to the "publication" clause, these illustrations were appropriate for publication in "articles, books, journals, newspapers, or albums." In addition, any permitted illustrations had to meet various size and color restrictions.

Plaintiffs argued that the purpose requirement of section 504

> *numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums.)*
>
> Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions:
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
>
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

18 U.S.C. § 504 (1984). The underlined portion of paragraph 504(1)(D) was the "purpose" clause. The italicized portion of paragraph 504(1)(D) constitutes the "publication" clause.

was not a valid time, place, and manner regulation because it discriminated on the basis of content, and the Supreme Court agreed. The Court held that "[a] determination concerning the newsworthiness or educational value of a [reproduction] cannot help but be based on the content . . . and the message it delivers." The Court went on to say that the legality of the reproduction was often "dependent solely on the nature of the message being conveyed." *Regan*, 468 U.S. at 648 (quoting *Carey* v. *Brown*, 447 U.S. 455, 461 (1980)). the Court reiterated its position with regard to regulations affecting First Amendment rights:

> Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

Id. at 648-49 (citations omitted).[24]

In response to this decision, Congress revised 18 U.S.C. § 504, deleting the purpose and publication clauses.[25] The current

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[24]The plurality opinion of the Court did not address the plaintiffs' challenge of validity to the publications clause on vagueness and other grounds. The Court simply stated that Time had and would never "have any difficulty in meeting that requirement." *Id.* at 649. Two Justices felt that the publications clause was facially overbroad. *Regan*, 468 U.S. at 677-90 (Brennan, J., concurring and dissenting). Two others felt that the statute could not stand without the publications clause, and therefore the entire statute should be invalidated without considering whether the clause could survive independently. *Id.* at 691-92 (Powell, J., concurring and dissenting). One other felt it "wholly unnecessary to consider" the issue. *Id.* at 696 (Stevens, J., concurring and dissenting).

[25]Plaintiff still argues that the publication clause is unconstitutional. Defendants argue that the "publication" regulation has been deleted from the statute, and this court agrees.

Plaintiff argues that the publication clause permits "only the 'printing, publishing, or importation' of illustrations meeting the size and color restrictions." Plf.'s Opp'n Def.'s Mot. Dismiss at 2-3; 18 U.S.C. § 504(1). However, in *Regan*, the Supreme Court identified the publication

section 504 only sets out "size and color" limitations on illustrations of currency.[26] Under this section, persons may be authorized by the Secret Service to make illustrations of United States currency if the illustrations are in black and white and of a size that is less than three-fourths or more than one and one-half times the linear dimension of real currency.[27]

In the present action, defendants again attempt to justify the restrictions imposed by section 504 as reasonable time, place, and manner regulations. In order to be constitutional, a time, place, and manner regulation must meet three requirements. First, it "may not be based upon either the content or subject matter of speech." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (quoting *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980). Second, it must "serve a significant governmental interest." *Id.* at 649 (quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). And third, it must

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clause as the provision requiring that the illustrations be published "in articles, books, journals, newspapers or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums)." Thus, plaintiff's argument that the "publication" clause is unconstitutional is incorrect; indeed, the issue is moot.

[26]This section also sets out restrictions regulating reproductions of currency and other obligations created from motion pictures, microfilms, and slides that are not at issue in this case.

[27]Congress also added a paragraph requiring the Treasury to "prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes." 18 U.S.C. § 504(1). No such regulations have been promulgated. No proposals have been published for notice and comment in the Federal Register either. This court did take this disturbing Treasury inaction into consideration in determining whether to hear the merits of the case and deciding this matter.

"leave open ample alternative channels for communication of the information." *Id.* at 648 (quoting *Virginia Pharmacy Board*), 425 U.S. at 771). In addition, restrictions on First Amendment rights "must . . . be narrowly tailored and no more burdensome than necessary to advance the protective goal" of the government. *Action for Children's Television* v. *FCC*, No. 93-1092, slip op. at 26 (D.C. Cir. November 23, 1993); *see also, e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).[28] This is an overbreadth doctrine: a laws is void on its face if it "does not aim specifically at evils within the allowable area of (government) control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

The Supreme Court directly addressed the constitutionality of the size and color restrictions in *Regan* v. *Time, Inc.*[29] When passing on whether to address the publications clause in *Regan*, the Supreme Court noted in a footnote:

> Given the fact we hold that, even the absence of both the purpose and publication requirements, the color and size requirements can constitutionally be applied to Time, . . .

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[28]As the U.S. Court of Appeals noted in *Kerrigan*, 865 F.2d 382 (D.C. Cir. 1989):

> [T]he "narrowly tailored" portion of the time, place or manner test requires that there be a *real nexus* between the challenged regulation and the significant governmental interest sought to be served by the regulation. It the regulation does not meaningfully advance the interest, the regulation cannot withstand constitutional scrutiny if it restricts free expression in a public forum."

865 F.2d at 388 (emphasis in original).

[29]Although the text of the statute is different, the present size and color restrictions differ in no way from the size and color restrictions at issue in *Regan*.

> and that Time has made no showing that the validity of the publication requirement by itself is of any interest to it, we see no need to reach out and decide the latter issue on our own.

Regan, 468 U.S. at 649-50 n.6. The plurality manifest their intent in passing solely on the size and color restrictions by stating:

> More importantly, even if both requirements were unconstitutional, it does not follow that the entire statute must fail. . . . Justice Brennan seems to misconceive the premise upon which our argument is based as he goes to great lengths to establish that the publication requirement and the purpose requirement and the purpose requirement "are so completely intertwined as to be plainly inseverable . . . . Our severability argument proceeds on the premise that both the purpose and publication requirements are unconstitutional. Thus, our entire discussion is directed at whether the color and size requirements can survive on their own.

Regan, 468 U.S. at 652 n.9.[30]

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[30]In deciding whether the size and color requirements could survive on their own, the Court stated its cautious approach in reviewing the constitutionality of legislative acts:

> In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." Thus, this Court has upheld the constitutionality of some provisions of a statute even though other provisions of the same statute were unconstitutional. For the same reasons, we have often refused to resolve the constitutionality of a particular provision of a statute when the constitutionality of a separate, controlling provision has been upheld.

In considering the validity of the color and size limitations, the Court found the size and color restrictions to be reasonable time, place and manner regulations. The Court noted that the size and color limitations did not discriminate on the basis of content.[31]

Regan, 468 U.S. at 652-53 (citations omitted).

[31]The Court opined:

> Compliance with the color and size requirements does not prevent Time from expressing any view on any subject or from using illustrations of currency in expressing those views. More importantly, the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations. Those limitations restrict only the manner in which the illustrations can be presented. They are thus similar to the decibel level restrictions upheld by this Court . . . and the size and height limitations on outdoor signs upheld by other courts.

Regan, 468 U.S. at 656 (citations omitted).

Mr. Boggs states:

> The size and color of my work are integral to its meaning. My work simply would not carry the same meaning in black and white or in grotesquely enlarged or comically shrunken size. Their components-size, color, image, texture-are the elements of all visual art. My work is not used to "illustrate" some other point. The image stands alone as the vehicle by which the viewer confronts and understands the ideas my work explores. By altering its components (its size, for example, or its color, I would alter the meaning the work has for the viewer. If the size or color) of my work is restricted, its content and meaning are also restricted.

Boggs Aff. ¶ 9. This court notes that Mr. Boggs' work may be somewhat affected when it does not appear to be actual currency. However, this limitation is not *based* on content or the message it delivers. It is a mechanical restriction, requiring no inquiry or evaluation into "the nature of the message being imparted in order to enforce the color and size limitations." *Regan*, 468 U.S. at 656. When plaintiff suggests that the size and color restrictions are somehow content-based as

The Court rejected an argument that the color restriction was not narrow enough.[32] The Court further stated that "the propriety of

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they apply to Boggs' work, the Supreme court rejected a similar argument in *Ward* v. *Rock Against Racism*, when it stated "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others." 109 S.Ct. at 2754.

As Justice Stevens noted regarding the color limitations, in his concurring and dissenting opinion in *Regan*:

> A color other than the actual color, or one similar to it might be communicative under some circumstances, . . . [and] Time may argue . . . that the black and white requirement is overbroad on the ground that it is irrational as applied to any color other than a color similar to the actual color of the currency. But the legitimate sweep of the statute dwarfs its arguably impermissible applications because it seems quite plain that ordinarily it is the actual color which would be selected most often.

Id. at 701 n.5 (Stevens, J., concurring and dissenting). He continued:

> The front of the United States currency is not very colorful in any event. Aside from the serial numbers and the Seal of the Department of the Treasury, which are a rather vivid green, the rest of the image borders on being black and white itself. The difference between printing a black and white image of it and and [sic] color image of it would have a *de minimis* impact on the value of the image for communicative purposes, . . . but would have a significant impact on the value of the image for fraudulent or deceptive purposes.

Id. at 701 n.6.

[32]*Id.* at 656. Time argued that despite the Government's interest in prevent counterfeiting, the color restrictions were drawn "broader than is necessary to achieve the Government's interest in preventing counterfeiting." *Id.* Time suggested that these restrictions applied regardless of an illustrations' likelihood of deceiving anyone. The Court stated:

> Time places too narrow a construction on the Government's

the size limitation is even clearer." *Id.* The Court described the size limitation as "a reasonable and sufficiently precise way of ensuring that the illustrations themselves do not have the capacity to deceive the unwary and inattentive." *Regan*, 468 U.S. at 658.

In *Regan*, no one disputed that the statute left open adequate alternative channels for communication of information. This element of the test is easily met. The evolution of the counterfeiting statute itself shows how it leaves open ample channels: From

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> interest and too heavy a burden on those enacting time, place, and manner regulations. The Government's interest in preventing the color photographic reproduction of currency is not limited to its desire to prevent would-be counterfeiters from utilizing the illustration itself. The requirement that the illustration be in black-and-white is also designed to make it harder for counterfeiters to gain access to [items] that could easily be altered and used for counterfeiting purposes.

Id. at 656-57. The Court concluded its discussion of the color limitations by stating "[i]t is enough that the color restriction substantially serves the Government's legitimate ends."

There is no question that §§ 474 and 504 address substantial governmental interests. *See* U.S. Const., Art. I, § 8, cl. 5 (Congress is empowered "[t]o coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures); *id.*, cl. 6 "[t]o provide for the Punishment of counterfeiting the Securities and current coin of the United States"). As observed by Justice Stevens in *Regan*, these governmental functions go to the core of governmental interest. *Regan*, 468 U.S. at 696 (Stevens, J., concurring and dissenting).

This court notes that the government has legitimate concerns. In their pleading, the Secret Service stated that over $55 million in counterfeit currency was seized before being passed to the public and over $16 million was seized in circulation in fiscal year 1992. Decl. Richard Outland ¶ 3. The Secret Service anticipates in the very near future, the public will have widespread accessibility to advance copier and printing equipment, adding to the current increase in widely dispersed counterfeiting activities. *Id.* ¶ 4. The currency of the United States is the most counterfeited in the world today. *Id.* ¶ 7.

prohibiting all illustrations of currency until the enactment of section 504 in 1958, to the current statute restricting only color illustrations are close in actual size to genuine currency. As the Supreme Court noted in *Regan*, the possibilities are almost limitless. *Regan*, 468 U.S. at 658 n.13. Moreover, the issue is whether the statute leaves alternative channels of communication for anyone, not just Boggs. *See Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)

This statute also serves a significant governmental interest. As Justice Stevens noted in *Regan*, "[a] core governmental function is implicated in this case, and the compelling nature of the Government's interest in demonstrated by the fact that . . . the Constitution expressly empowers Congress '[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.'" *Regan*, 468 U.S. at 696. However, plaintiff challenges that the government does not establish a real nexus between the statute and the governmental interest to be protected. After reviewing the government's evidence as to a real nexus, this court agrees with Justice Stevens that section 504 "is one weapon in an arsenal designed to deprive would-be counterfeiters and defrauders of the tools of deception and, . . . I believe the color and size requirements are permissible methods of minimizing the risk of fraud as well as counterfeiting . . . ." *Id.* at 704.

In *Regan*, the Supreme Court ruled that the "size and color limitations are . . . reasonable manner regulations that can constitutionally be imposed on those wishing to publish photographic reproductions of currency." *Id.* at 659. This court finds that section 504 may be constitutionally imposed upon those wishing to create illustrations of currency as well. Section 504 is constitutional, facially and as applied to Mr. Boggs. "Because the provisions of § 474 are of real concern only when the limitations of § 504 are not complied with, § 474 is also constitutional." *Id.*

Justice Brennan, concurring and dissenting, stated:

> I do not doubt that a statute can be written that would both satisfy the requirements of the First Amendment and effectively advance the legitimate and important ends

Congress sought to achieve in §§ 474, ¶ 6, and 504.

Id. at 691. This court believes the legislative amendments that devised the current statutory text of sections 474 and 504 have created just such a statute.

2. *Application of Section 474 to Mr. Boggs*

Plaintiff's second challenge to the statutory provisions is that 18 U.S.C. § 474[33] does not apply to him. Section 474 proscribes

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[33] § 474 Plates or stones for counterfeiting obligations or securities

(a) Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

possession of counterfeit obligations and equipment necessary to a counterfeiting operation. Paragraphs Five and Six of section 474 are at issue in this case.[34]

The necessary elements of proof under paragraphs five and six

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Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, *any obligation* or other security *made* or executed, *in whole or in part, after the similitude of any obligation* or other security issued under the authority *of the United States, with intent to sell or otherwise use the same*; or

Whoever prints, photographs or in any other manner makes or executes *any engraving, photograph, print, or impression in the likeness of any such obligation* or other security, *or any part thereof*, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—*Is guilty of a class C felony.*

(b) For purposes of this section, the terms "plate", "stone", "thing", or "other thing" includes any electronic method used for the acquisition, recording, retrieval, transmission, or reproduction of any obligation or other security, unless such use is authorized by the Secretary of the Treasury. The Secretary shall establish a system (pursuant to section 504) to ensure that the legitimate use of such electronic methods and retention of such reproductions by businesses, hobbyists, press and others shall not be unduly restricted.

18 U.S.C.A. § 474 (West Supp. 1993) (emphasis added).

[34]The Secret Service objects to focusing on these two specific paragraphs as basis for potential prosecution. The Service suggests that they should not be required to speculate as to which, if any, criminal statutory provisions may form the basis of a criminal prosection of Mr. Boggs. Although the exact wording of an indictment may be speculative, the Service cannot deny that these sections are applicable to Boggs' work, and the Service does not deny that prosection may be sought under these two paragraphs. These two paragraphs are attacked by plaintiff, and justified by defendants in their pleadings. Therefore, this court will be determine their applicability to Boggs.

of section 474 differ. Paragraph five prohibits the possession of any obligation made, in whole or in part, after the similitude of genuine United States currency. This paragraph requires an "intent to sell or otherwise use" the obligation. Under paragraph six, it is a felony to make or execute in any manner an engraving, photograph, print or impression in the likeness of genuine United States currency. No showing of intent is required. *See supra* note 29.

Plaintiff's challenge to the applicability of the statute is threefold. First, plaintiff suggests that an intent to defraud requirement must be read into paragraphs five and six of section 474. No one seriously suggests that Mr. Boggs has any intent to defraud.[35] In fact, all parties know the nature of the transaction before Boggs engages in any bargaining. Therefore, if intent to defraud is statutorily required, no jury could find that the statute applies to Boggs. Second, plaintiff claims that his illustrations are not after the likeness or in the similitude of genuine United States currency. Finally, plaintiff argues that the plain wording of section 474 does not apply to his creative process or his final product. For these reasons, plaintiff seeks to enjoin the Secret Service from disturbing his work.

a. *Intent to Defraud*

Plaintiff argues that every counterfeiting statute requires the government to prove an intent to defraud on the part of the accused. Plaintiff suggests that counterfeiting means to copy or imitate wtih a eye toward deception or fraud. Plaintiff notes that section 474 was originally a Civil War-era codification[36] of a

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[35]In fact, plaintiff states that he is unaware of a single person who has complained to any law enforcement authority about being defrauded by Boggs or anyone else using his bills. Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 3.

[36]As noted in *Regan*, "Title 18 U.S.C. § 474 was enacted during the Civil War to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time." *Regan*, 468 U.S. at 643

common-law crime, counterfeiting, and that "such codifications are presumed to require proof of the *mens rea* element required for conviction at common law, absent specific congressional intent to the contrary." Plf.'s Mem. Mot. T.R.O. & Prelim. Inj. at 21.

As support for this proposition, plaintiff quotes Chief Justice Burger's exposition in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978):

> "[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence . . . . It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'"

438 U.S. 422, 436 (1977) (citing *Dennis* v. *United States*, 341 U.S. 494, 500 (1951); *Morissette* v. *United States*, 342 U.S. 246, 250-51 (1952)). According to *United States Gypsum*, *Morissette* "can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an *interpretative presumption*, that *mens rea* is required. . . . Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States Gypsum*, 438 U.S. at 437-38 (emphasis added).[37]

(citations omitted). For a more complete history of the counterfeiting statutes, see *id.* at 643-46.

[37]Plaintiff also states that *Morissette's* presumption becomes critical when applied to individual First Amendment rights. As the Ninth Circuit has explained in holding that a "strict liability" criminal statute *must* be interpreted to allow a state-of-mind defense in the prosecution of a filmmaker:

> [T]he First Amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech.

In *Morissette*, the Air Force established a practice bombing range in a sparsely populated area of Michigan. This area was known to be "good deer country" and was extensively hunted. *Id.* at 247. The simulated bomb casings were thrown into piles and "were dumped into heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away." *Id.*

Mr. Morissette unsuccessfully hunted this land. However, being an industrious man, he was struck with an entrepreneurial idea. He began salvaging the bomb casings. He loaded, crushed, and transported these casings, realizing an $84 profit for his efforts.

When investigated, Morissette "voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government." *Id.* at 248. Morissette was indicted on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of $84 in violation of 18 U.S.C. § 641, which provides for the punishment by fine or imprisonment to "whoever embezzles, steals, purloins, or knowingly converts" government property. *Id.*

Despite his lack of intent to steal, Morissette was convicted by the trial court and sentenced to a fine of $200 or two months in prison. On appeal, the Supreme Court held that the mere omission from section 641 of any mention of intent was not to be construed as eliminating the element from the crime. Thus, a statute codifying the traditional, common-law crime, such as counterfeiting, the argument goes, should carry an interpretive presumption of a *mens rea* requirement, *absent a clear legislative purpose to the contrary*.

United States v. *United States Dist. Court (Kantor)*, 858 F.2d 534, 540 (9th Cir. 1988) (Kozinski, J.). However, this court is of the opinion that the current statutory provisions do not unconstitutionally or seriously chill protected speech.

1. *Paragraph Five*

The courts dealing with this provision have ruled that no *intent to defraud* requirement exists. Plaintiff argues that these cases fail to address the *Morissette* intent issue and are incorrectly decided. Plaintiff maintains that even though paragraph five of section 474 explicitly requires an "intent to sell or otherwise use," this section necessarily implies an intent to defraud or pass as genuine.

Although not specifically mentioning *Morissette*, the Eleventh Circuit rejected a similar argument in *United States* v. *Parr*, 716 F.2d 796, 807-08 (11th Cir. 1983). As the court opined:

> We disagree with appellant that the intent standard of § 474 necessarily implies an intent to defraud or an intent to pass as genuine. Congress explicitly stated that an "intent to sell or *otherwise use*" is the requirement. If Congress intended an intent to *defraud* or an intent to *pass as genuine* standard it would have said so explicitly, as in the two sections immediately preceding § 474.

Id. at 808 (citation omitted) (emphasis in original).

In *Wagner* v. *Simon*, *supra* section II.B., the court stated that "intent in causing the reproduction to be made [in violation of paragraph five] is not a factor to be considered." *Wagner*, 412 F. Supp. 426, 430 (W.D. Mo. 1974) (citing *Webb* v. *United States*, 216 F.2d 151, 152-53 (6th Cir. 1954); *Wholesale Vendors, Inc.* v. *United States*, 361 F. Supp. 1045 (N.D. Tex.), *aff'd*, 486 F.2d 1402 (5th Cir. 1973)). This court believes that Congress was clear and agrees with the holdings in *Parr* and *Wagner*. Paragraph five of section 474 does not require an intent to defraud or an intent to pass as genuine.

The evidence is undisputed that Boggs uses his reproductions and illustrations in exchange for substantial economic benefit and artistic recognition. The Service would not be barred from employing paragraph five in any future criminal prosecution because of the lack of intent on the part of Mr. Boggs.

2. *Paragraph Six*

Paragraph six creates federal penalties for anyone who makes any illustrations of currency for any purpose, even in the absence of an unlawful intent.[38] This provision is enforced regardless of whether such images of money might be fraudulently employed. Again, plaintiff suggests that this section requires an intent to defraud or pass as genuine. This claim is not as easily dismissed because paragraph six of section 474, unlike the other counterfeiting provisions in Title 18, imposes criminal liability without *any* showing of unlawful intent.

At first blush, paragraph six appears to run afoul of the *Morissette* statutory presumptoin. However, the statutory provision at issue is but one part of a comprehensive scheme to meet the governmental interest in preventing counterfeiting. Other offenses included in the statute, such as the unlawful possession of counterfeit obligations, require proof of unlawful intent according to the express provisions of the statute. However, in this paragraph, Congress provided that the mere making of any print, impression, photograph, or engraving in the likenesss of any United States obligation or security is a violation of the statute without proof of unlawful intent. *See Webb*, 216 F.2d at 152.

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[38]Justice Brennan noticed this fact in *Regan* v. *Time, Inc.*:

> Title 18 U.S.C. § 474, ¶ 6, makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 U.S.C. § 504 . . ..

Regan v. *Time, Inc.*, 468 U.S. 641, 659 (1984) (Brennan, concurring and dissenting). Justice Brennan's belief that this section contained no *mens rea* element is evidenced by a statement later in the opinion: "And because § 474, ¶ 6, unlike the other counterfeiting provisions in Title 18, imposes criminal liability without any showing of unlawful intent . . . ." *Id.* at 682.

In *Webb* v. *United States*, 216 F.2d 151, 152 (3d Cir. 1954), appellants "were engaged in a confidence game in which they sought to swindle a third party through an alleged process for making money." Appellants planned to have the party furnish them with $10,000 worth of ten dollar bills. Appellants promised a return of approximately nine times as much money. "In the course of their swindle, they would, of course, abscond with the genuine money." *Id.* To set up the sting, appellants coated a genuine bill with a common, household disinfectant. Placing it between two sheets of paper, they pressed the sheets against the bill. A considerable amount of ink was transferred. As the demonstration of their process proceeded, Treasury agents arrested them as they completed the transferring process. *Id.*

When appellants attacked the conviction, suggesting that the bills were not in the likeness of currency and were merely samples in furtherance of a scam rather than impression created with an intent to pass as genuine, the court stated:

> The legislative purpose is clear that Congress intended, in protecting the currency, to tolerate no manipulation in the making of impressions of government obligations or securities, whether the copies or impressions might be good or bad, and regardless of the purpose for which they might be made. . . . [T]here being no need of proof of unlawful intent, there is no need of proof that such impression were calculated to deceive.

Id.

As the Supreme Court has stated, "Congress enacted [several] statutes that together restrict . . . reproductions of currency." *Regan*, 468 U.S. at 643. This court believes that a logical inference can be drawn from the structure of the counterfeiting statute: Congress intended some crimes to carry an intent to defraud requirement and others not, as evidenced by the differences in classification and punishment set out in the statute.[39]

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[39]The first four paragraphs of paragraph six criminalize various

Existing case law dictates that an intent to defraud is not an element of paragraph six. these cases were correctly decided, and given the substantial government interest at stake regarding the currency and the constant threat of counterfeiting, the scope of the statute is reasonable.[40] No facts suggest that a jury would be foreclosed from finding Mr. Boggs guilty of violation of the aforementioned statutory prohibition. The Service should not be prohibited from employing paragraph six in any future criminal prosecution because of the lack of intent on the part of Mr. Boggs.

b. *In the Likeness and After the Similitude*

"Boggs' work cannot be said to be in the 'likeness' or 'similitude' or genuine currency." Plf.'s Mem. Mot. T.R.O. & Mot. Prelim. Inj. at 28. So goes plaintiff's argument. Although Boggs describes his work as actual-sized, *trompe l'oeil* pieces, the

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fraudulent behavior, the next two extend only to the use or possession of counterfeit items. When Congress wanted to include an intent element, it did so. For example, paragraphs 1, 3, 4, and 5 all mention an intent requirement. It seems clear that Congress created these sections with intent requirements in mind that would curb the conduct they sought to restrict. The remainder of the section creates crimes for possession of items that could be used in counterfeiting obligations and securities.

Moreover, the sections surrounding section 474 show that Congress explicitly stated the requisite intent in the text of the statutes for which intent was desinged. *See, e.g.*, section 471 prohibits forging, counterfeiting, or altering any obligation with intent to defraud; section 472 restricts passing, uttering, publishing, or selling (or attempting to do so), or importing, possessing, or concealing a forged, counterfeited or altered obligation with intent to defraud; *see also* §§ 473, 477, 484, 491. Congress enacted a comprehensive anti-counterfeiting scheme. Congress included *mens rea* where applicable and strict liability offenses when such would aid in their efforts to drive out counterfeiting.

[40]Moreover, this court believes paragraph six of section 474 possesses an "element of criminal intent," complying with *Morissettte*. This court believes that the proper standard of intent for a violation under paragraph six of section 474 is "knowing." *See United States* v. *Green*, 962 F.2d 938, 942 (9th Cir. 1992).

Complaint states "Boggs' bills do not look so 'real' . . . that a person of average intelligence and ordinary observation cannot readily and immediately distinguish them from genuine currency," and that "even the most cursory glance at one of Boggs' bills makes that immediately clear." Compl. ¶ 6.

Paragraph five makes it a felony to possess with intent to sell or use any obligaiton made, in whole or in part, "after the similitude" of money. Paragraph six forbids illustrations created "in the likeness" of genuine United States currency. The test for these two provisions is different. *See Wagner* v. *Simon*, 412 F. Supp. 426, 430 (W.D. Mo. 1974), *aff'd* 534 F.2d 833 (8th Cir. 1976) (citing *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969), *cert. denied* 402 U.S. 948 (1971)) (noting differences in the "in the likeness" and "after the similitude" test).

The "similitude" standard, the more stringent of the two standards under section 474, is "whether the fraudulent obligation bears *such a likeness* or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." *United States* v. *Parr*, 716 F.2d 796, 807 (11th Cir. 1983) (citing *United States* v. *Turner*, 586 F.2d 395, 397 & n.6 (5th Cir. 1978), *cert. denied*, 440 U.S. 926 (1979)) (emphasis added). Thus, the "in the likeness" test, is a part of the "similitude" test. *Webb* v. *United States*, 216 F.2d 151, 153 (6th Cir. 1954). Both standards are questions of fact for the jury. *Id.*; *Leib* v. *Halligan*, 236 F. 82, 85 (9th Cir. 1916). Since the facts of this case arguably fit under either provision, the court will consider Boggs' work under the more rigorous "similitude" test.

At a hearing on September 28, 1993, this court viewed the 15 samples of Boggs' work that were seized by the Secret Service.[41]

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[41]These particular samples have been adjudged to be after the similitude and in the likeness of genuine United States currency by Counterfeit Specialist and Questioned Document Examiner Stewart in the

Thereafter, plaintiff submitted a portfolio of his work. Summ. J. Hearing, Plf.'s Ex. 1.[42] The court, having viewed these items and found that they have the general pattern of general currency, including portraits in the middle, federal reserve seals and numbers, treasury seals and numbers, signature blocks and numeric features, in the size and color similar to genuine currency, finds that a jury would be justified, if not compelled, to find that these items were in the likeness and similitude of genuine United States currency.

This court believes that many of the Boggs Bills could be passed as genuine. Although Boggs prides himself on those characteristics of his bills that distinguish them from real currency, some of the works in question are far too similar to authentic currency for this court to conclude that a jury could not find that a person of average intelligence and ordinary observation could not readily and immediately distinguish them from genuine currency, satisfying the "similitude" standard. Indeed, art with more numerous and egregious distortions have been held to be counterfeit. *See, e.g., Wagner* v. *Simon*, 412 F. Supp. 426 (W.D. Mo. 1975), *aff'd* 534 F.2d 833 (8th Cir. 1976).

c. *Wording covers Boggs' Process and Subject Matter*

The first of plaintiff's arguments under this heading is that the "operative language" of the statute only concerns "engraving, photograph, print, or impression." Plf.'s Mem. Mot. T.R.O. & Mot. Prelim. Inj. at 30. Plaintiff claims that the "engraving, photograph, print, or impression" language of paragraph six does not cover hand-drawn pictures and photocopies. Plaintiff argues that the creation of the likeness of the obligation or security

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Forensic Services Division of the United States Secret Service. *See* Larry Steward Decl. ¶ 5.

[42]This portfolio is to remain in the custody of plaintiff's counsel as exhibits in this case until the conclusion of this case, including any appeal. No determination has been made as to whether any items within the portfolio constitute contraband.

requires a *mechanical* process of reproduction. *Id.* at 30-31.

This court declines to follow plaintiff's narrow interpretation of the words "print" and "impression." We believe this statute was intended to cover illustrations and reproductions of currency, regardless of whether hand made or the result of a particular mechanical process. Moreover, many of Boggs' pieces are photocopies of "hand-drawn work that are then hand-inked and signed by the artist." *Id.* at 31. These pieces are the result of a mechanical process and suggest that this statute applies to Boggs' work. The plaintiff's narrow view of the statute does not prohibit the Service from prosecution under this section.

Finally, plaintiff argues that the fifth paragraph of section 474 applies only to "obligations" and "securities," and that pieces of art are not obligations, "legal instruments evidencing intangible interests in property." *Id.* n.10. Plaintiff goes on to correctly state that "courts have rejected prosecutions under this and similar statutes for items that did not, on their faces," purport to be obligations or securities. *Id.* (citations omitted).

This argument is wholly without merit. In support of his definition of "security" and "obligation," plaintiff quotes from *Black's Law Dictionary*, suggesting that an obligation evidences a written promise to pay money and a security evidences indebtedness or an investment in a common enterprise. However, 18 U.S.C. §8 provides the definitions of "obligation" and "security" as used in section 474. This definition expressly includes federal reserve notes.[43] Mr. Boggs' illustrations of currency are covered

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[43]The full text of the statute reads:

> The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and

by this section as well.

III. *CONCLUSION*

This court does not doubt the credentials and talents of Mr. J.S.G. Boggs. One of the purposes behind Boggs' work is to explore issues of trust and value and to question the usefulness of value of are and money. As Boggs states:

> In part, my work is designed to elucidate the idea that the value of money. . . should be consciously accepted on the basis of our trust in each other and in our social and political institutions.

This court has viewed plaintiff's work and has carefully considered Mr. Boggs' proposition regarding the value of money. This court accepts Boggs' belief that money is valued, in part, because of our trust of our political institutions. To that end, these political institutions should be given the means by which to establish and maintain the value of United States currency. This court concludes that the provisions of section 474 and 504 give the Treasury this power without impinging upon Mr. Boggs' constitutional rights.

It is often said that "a picture is worth a thousand words." Unfortunately, Mr. Boggs' works are often worth a thousand dollars.[44] This court finds no bar to the application of the

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cancelled United States stamps.

18 U.S.C. § 8 (1969); *see United States* v. *Grismore*, 564 F.2d 929, 931-32 (10th Cir. 1977), *cert. denied* 435 U.S. 954 (1978) ("Section 8, 18 U.S.C. defines the term 'obligation or other security of the United States' to include 'Federal Reserve notes.'").

[44]As Justice Stevens noted in *Regan*:

> Time notes that one of these pictures may be worth a thousand words; the Government notes one of these pictures or negatives may be worth a thousand dollars. *Regan*, 486 U.S. at 701

statutory provisions to Boggs and refuses to enjoin any possible enforcement by the Secret Service or United States Attorney's Office.

Having found no material issues of fact, this court finds that sections 474 and 504 are constitutional on the face and as applied to plaintiff. Defendants are entitled to summary judgment as a matter of law. Defendants' motion to dismiss is denied. Plaintiff's cross-motion for summary judgment is denied and the complaint is dismissed.

A separate order shall issue this date.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATED: December 9, 1993

(Stevens, concurring and dissenting).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1845

J.S.G. BOGGS,

Plaintiff,

v.

ELJAY BOWRON, *et al.*,

Defendants.

ORDER

This case comes before the court on plaintiff's request for preliminary injunctive relief, defendants' motion to dismiss, and cross-motions for summary judgment. For the reasons set forth in an accompanying opinion, it is hereby ORDERED that:

1. Defendants' motion to dismiss is DENIED.

2. Plaintiff's motion for summary judgment is DENIED.

3. Defendants' motion for summary judgment as a matter of law is GRANTED, and this case is hereby dismissed with prejudice.

4. Plaintiff's motion for preliminary injunctive relief is DENIED as moot.

SO ORDERED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: December 9, 1993

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1845

J.S.G. BOGGS,

Plaintiff,

v.

ELJAY BOWRON, *et al.*,

Defendants.

ORDER

Upon consideration of Plaintiff's Motion for Correction of Error in Memorandum Opinion, and upon Defendants' Motion To Dismiss Or, in the Alternative for Summary Judgment, and upon the record and hearings held herein, and the Court being fully informed of the premises herein, plaintiff's motion for correction is GRANTED and, it is hereby

ORDERED, that the last two sentences of footnote 20 of the Court's December 9, 1993, Memorandum Opinion are stricken. And it is further

ORDERED, that Defendants' Motion to Dismiss the Second Claim for Relief or, in the alternative, for Summary Judgment on it is **DENIED**. And it is further

ORDERED, that the Clerk of the Court shall forthwith enter a **FINAL JUDGMENT DISMISSING PLAINTIFF'S FIRST CLAIM FOR RELIEF**, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Court determines that there is no just reason for the delay of entry of such judgment. And it is

further

ORDERED, that proceedings on Plaintiff's Second Claim for Relief shall be held in abeyance, and that Defendants shall answer or otherwise respond to Plaintiff's Second Claim for Relief thirty days after either (1) final resolution of any appeal (including the disposition of any petition to the United States Supreme Court for a writ of certiorari by either party) of the Judgment dismissing the First Claim for Relief in Plaintiff's Complaint; or (2) the expiration of Plaintiff's time to appeal such Judgment, if no appeal is taken.

SO ORDERED:

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Dated: March 27, 1995

APPENDIX E

Survey of Magazines Not Satisfying Size and Color Restrictions of 18 U.S.C. § 504

Magazine (Circulation)*	Date	Pages
Business Week (889,000)	Apr. 17, 1995	5
	Apr. 17, 1995	34
	Apr. 3, 1995	89
	Mar. 27, 1995	164
	Mar. 20, 1995	2
	Mar. 20, 1995	46
	Mar. 20, 1995	120
	Mar. 13, 1995	50
	Mar. 13, 1995	81
	Feb. 27, 1995	Cover
	Jan. 30, 1995	85
	Jan. 23, 1995	16
	Jan. 23, 1995	102
	Jan. 16, 1995	20
	Jan. 16, 1995	98
	Jan. 9, 1995	13
	Jan. 9, 1995	34
	Jan. 9, 1995	111
	Dec. 26, 1994	6
	Dec. 19, 1994	75
	Dec. 5, 1994	40
	Nov. 21, 1994	43
	Nov. 14, 1994	63
	Nov. 7, 1994	143
Esquire (725,500)	Apr. 1995	69
	Dec. 1994	60

*Source: Audit Bureau of Circulation, *Magazine Trend Report* (1994)

The Economist (241,600)	Apr. 29, 1995	57
	Mar. 18, 1995	65
	Mar. 11, 1995	Cover
	Feb. 25, 1995	73
	Jan. 7, 1995	57
	Dec. 10, 1994	28
	Dec. 10, 1994	74
	Nov. 26, 1994	21
Fortune (917,100)	Apr. 3, 1995	127
	Feb. 6, 1995	83
	Jan. 16, 1995	79
Forbes (768,900)	Apr. 24, 1995	393
	Mar. 27, 1995	98-108
	Mar. 13, 1995	185
	Feb. 27, 1995	35
	Feb. 27, 1995	135
	Feb. 27, 1995	Supp. 45
	Jan. 16, 1995	13
	Jan. 2, 1995	177
	Dec. 19, 1994	139
	Dec. 19, 1994	174
Interview (160,300)	Nov. 1994	113
Kiplinger's Finance (1,133,300)	Mar. 1995	9
	Mar. 1995	89
	Mar. 1995	90
	Jan. 1995	2
Life (1,713,600)	Dec. 1994	51
Money (2,126,400)	Mar. 1995	71

	Feb. 1995	123
	Jan. 1995	78-79
	Jan. 1995	37
Newsweek (3,221,000)	Feb. 20, 1995	7
	Jan. 30, 1995	3
	Jan. 9, 1995	51
	Jan. 2, 1995	2
Scientific American (639,800)	Apr. 1995	3
	Apr. 1995	34
	Apr. 1995	125
	Apr. 1995	129
	Jan. 1995	17
	Nov. 1994	5
Smart Money (400,900)	Mar. 1995	79
	Feb. 1995	5
	Feb. 1995	72
	Feb. 1995	112-19
	Feb. 1995	120
	Feb. 1995	126
	Jan. 1995	21
	Dec. 1994	80
	Dec. 1994	126
	Nov. 1994	23
	Nov. 1994	7
Time (4,219,400)	Mar. 20, 1995	58
	Mar. 13, 1995	28
	Mar. 13, 1995	16-18
	Mar. 13, 1995	13
	Feb. 20, 1995	19
	Nov. 14, 1994	7
	Nov, 14, 1994	9
	Nov. 14, 1994	16-17

U.S. News & World Report (2,351,800)	Apr. 24, 1995	65
	Feb. 27, 1995	2
	Jan. 23, 1995	13
	Jan. 16, 1995	46
	Dec. 12, 1994	84
	Dec. 5, 1994	72-82
Working Woman (832,100)	Feb. 1995	9
	Nov. 1994	9
Worth (282,500)**	Feb. 1995	60
	Dec. 1994	84-87
	Nov. 1994	61
	Nov. 1994	150

**Source: Audit Bureau of Circulations, *Magazine Publisher's Statements* (1994).

Total Paid Circulation of Magazines
Not Satisfying 18 U.S.C. § 504
(November 1994 to April 1995)

Publication	Circulation	Issues	Copies
Business Week	889,000	16	14,224,000
Esquire	725,500	2	1,451,000
The Economist	241,600	7	1,691,200
Fortune	917,100	3	2,751,300
Forbes	768,900	7	5,382,300
Interview	160,300	1	160,300
Kiplinger's Finance	1,133,300	2	2,266,600
Life	1,713,600	1	1,713,600
Money	2,126,400	3	6,379,200
Newsweek	3,221,000	4	12,884,000
Scientific American	639,800	3	1,919,400
Smart Money	400,900	5	2,004,500
Time	4,219,400	4	16,877,600
U.S. News	2,351,800	6	14,110,800
Working Woman	832,100	2	1,664,200
Worth	282,500	3	847,500
Total		**69**	**86,327,500**

APPENDIX F

This reproduction of a work of art from Plaintiff's Summary Judgment Exhibit No. 1 in the District Court is actual size:

Monumental Lanscape 14 Sept, 1993 J.S.G. Boggs 1/1

©J.S.G. Boggs 1993

(2)

Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

No. 95-1114

In the Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS, PETITIONER

v.

ELJAY BOWRON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 474 and 18 U.S.C. 504, which restrict the possession or production of illustrations of United States currency and other obligations and securities of the United States, violate the First Amendment.

2. Whether 18 U.S.C. 474 and 18 U.S.C. 504 could be applied to petitioner, who contends that he does not knowingly act to defraud.

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United States v. *Parr*, 716 F.2d 796 (11th Cir. 1983)	12
Webb v. *United States*, 216 F.2d 151 (6th Cir. 1954)	11

Constitution and statutes:

U.S. Const.:	
Art. I, § 8:	
Cl. 5	2
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Amend. I	3, 6, 8
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18 U.S.C. 474	2, 5, 6, 7, 8, 10, 11, 12, 13
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1114

J.S.G. BOGGS, PETITIONER

v.

ELJAY BOWRON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 67 F.3d 972 (Table). The opinion of the district court (Pet. App. 4a-46a) is reported at 842 F. Supp. 542.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1995. The petition for a writ of certiorari was filed on January 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution expressly gives Congress the power to "coin Money [and] regulate the Value thereof," Art. I, § 8, Cl. 5, and to "provide for the Punishment of counterfeiting the Securities and currency Coin of the United States," Art. I, § 8, Cl. 6. Pursuant to that authority, Congress enacted the statutes at issue in this case. The fifth and sixth paragraphs of 18 U.S.C. 474 prohibit possessing or producing the likeness of an obligation or security of the United States.[1] Another statute, 18 U.S.C. 504, creates exceptions to that prohibition. Section 504(1) permits the possession or production of illustrations of United States obligations and securities if the illustration is in black and white and less than 75% or more than 150% the size of the original, and if the

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[1] Paragraphs 5 and 6 of 18 U.S.C. 474 provide:

> [5] Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> [6] Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class C Felony.

negatives and plates used in making the illustrations are destroyed after their final use.[2] This Court has ruled that those statutes, read in tandem, do not violate the First Amendment. *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984).

---

[2] Section 504 (18 U.S.C.) provides:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.
>
> Illustrations permitted by the foregoing provision of this section shall be made in accordance with the following conditions —
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps * * * may be in color;
>
> (ii) all illustrations * * * shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps * * * may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.
>
> The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.

2. Petitioner is an artist and an academic. He concedes that "much of [his] work is in the 'image of money.'" Pet. App. 5a. He reproduces in color the currency of the United States. These reproductions are often "actual-sized, *trompe l'oeil* pieces." *Id.* at 6a. As such, they are intended to be mistaken by the viewer, at least momentarily, for actual currency. See *id.* at 6a n.7 (noting that *trompe l'oeil* means "fool the eye"). The district court found that "many of [petitioner's reproductions] could be passed as genuine." *Id.* at 43a.

Petitioner not only reproduces federal currency, but his reproductions (so-called "Boggs Bills") are used by him as "a medium of barter." Pet. 4. Petitioner purchases services or goods with the reproductions, in order to "elict a dialogue about the meaning and use of art and money." *Ibid.* As the district court found, "[a]fter explaining to merchants that he is an artist, Mr. Boggs then barters these pieces, offering to exchange his art for the face value of the reproduction in goods and services." Pet. App. 6a.

3. The Secret Service is charged with enforcing the laws of the United States enacted to deter and punish the counterfeiting of United States currency. Petitioner has been the subject of Secret Service scrutiny for years. In September, 1990, the Secret Service became aware that a catalog of petitioner's work would contain images that violated the counterfeiting statutes; the publisher was informed, and the catalog was not published. In March, 1991, the Secret Service office in Cheyenne, Wyoming, became aware that petitioner was going to use his reproductions to obtain merchandise from a local store; an agent and the U.S. Attorney for that district visited

petitioner and seized as contraband some samples supplied by petitioner. Pet. App. 7a-8a.

In September, 1992, petitioner appeared for an interview in Pittsburgh, Pennsylvania, with Secret Service agents and was informed of the statutory guidelines for reproducing U.S. currency. Later that year, after Secret Service agents seized several items of petitioner's work from his residence, studio, and office, pursuant to a duly executed search warrant, petitioner was informed that his reproductions were in violation of the counterfeiting statutes and that he was subject to prosecution. In early 1993, petitioner was again informed by letter that his continued reproduction and passing of Boggs Bills could subject him to prosecution. In May, 1993, petitioner sought permission of the Secretary of the Treasury pursuant to 18 U.S.C. 504 for permission to continue making and distributing his reproductions, but such permission was denied on September 2, 1993. Pet. App. 8a-9a.

4. On September 3, 1993, petitioner brought this lawsuit for declaratory and injunctive relief. He sought a declaration that the anti-counterfeiting statutes (18 U.S.C. 474 and 504) either do not apply to him, because he had no intent to defraud, or are unconstitutional, C.A. App. A19; an injunction prohibiting the government from prosecuting him under the counterfeiting laws or interfering with his work or possessions and requiring the government to return all property that had been seized, *id.* at A18-A19; and an award of compensatory damages for interference with and injury to his property, *id.* at A20.

5. The district court determined that petitioner had a well-founded fear of prosecution and that the claim was therefore ripe for adjudication under the

Declaratory Judgment Act. Pet. App. 10a-16a. The court then held that the statutes at issue were constitutional and did not require proof of intent to defraud. *Id.* at 19a-41a. The court entered a final judgment dismissing petitioner's claim for an injunction prohibiting the government from prosecuting him. *Id.* at 49a-50a. The court retained jurisdiction over petitioner's claim for return of property and for compensation, pending the final appellate disposition of petitioner's claim for an injunction. *Id.* at 50a.

In its opinion, the district court noted that the publishing of illustrations of United States currency falls within the protection of the First Amendment. Pet. App. 19a-20a. Analyzing Sections 474 and 504 in tandem, see *Regan* v. *Time, Inc.*, 468 U.S. at 647-648, the district court found the size and color restrictions of Section 504 to be reasonable time, place, and manner limitations that can be constitutionally imposed on those wishing to create illustrations of currency. The court observed that those statutory provisions serve a significant governmental interest, leave open adequate alternative channels for communication of information, and are not based on the content or subject matter of speech. Pet. App. 23a-33a.

The district court also rejected petitioner's claim that paragraphs five and six of Section 474 are not applicable to his activities because those paragraphs require an intent to defraud or an intent to pass as genuine and he did not have such an intent when he possessed or produced his "Boggs Bills." Pet. App. 33a-41a. The court additionally rejected petitioner's claim that his illustrations are not in the likeness or similitude of genuine United States currency. *Id.* at 41a-43a.

6. In an unpublished judgment order, the court of appeals affirmed, substantially for the reasons set forth by the district court. Pet. App. 1a-3a. The court specifically rejected petitioner's contention that "convictions under the fifth and sixth paragraphs of § 474 require proof of fraudulent intent." Pet. App. 2a. The court also rejected petitioner's contention that a jury could not find that his bills bore a "similitude" or "likeness" to United States currency, as required by the fifth and sixth paragraphs of Section 474, respectively. The court noted that petitioner sought a blanket "declaration that the statute does not apply to his work generally and an injunction that would protect him from prosecution for works in the same genre that he might produce in the future, or has already produced but not submitted for review." Pet. App. 2a. The court held that, even if it were convinced that the sample of work it reviewed would not violate the statute, it could not, based only on such a sample, "give him the relief he has requested," *ibid.*, and that petitioner had failed to ask for any narrower ruling.

ARGUMENT

The courts below correctly applied the holding of this Court in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), that the challenged provisions of Sections 474 and 504 are constitutional. Its decision does not conflict with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *Regan*, this Court rejected the principal argument made by the petitioner. In that case, eight Members of the Court concluded that now-repealed provisions of Section 504 that hinged the legality of a reproduction of currency on the purpose to which the reproduction was to be put were content-based

restrictions that violated the First Amendment. 468 U.S. at 659 & n.14. A majority of the Court also concluded, however, that the size and color restrictions of Sections 474 and 504 were constitutional. See 468 U.S. at 659. Writing for a plurality, Justice White found that those restrictions are "reasonable manner regulations," *id.* at 658, that "do not discriminate on the basis of content." *Id.* at 656. The plurality also recognized that the size and color requirements "effectively serve the Government's concededly compelling interest in preventing counterfeiting." *Ibid.* In a separate opinion, Justice Stevens discussed those same size and color limitations and agreed that they were constitutional. See *id.* at 700-704.[3]

2. Petitioner appears to argue that this Court's decision in *Regan* is not applicable because "Time's complaint has little to do with that of [petitioner], who asserts his own rights as an artist to create obviously non-deceptive likenesses of the currency not falling within the narrow safe harbor." Pet. 15 n.12. The record in this case, however, does not establish that petitioner was creating "obviously non-deceptive likenesses of the currency." Instead, the district court noted that "many of the Boggs Bills could be passed as genuine." Pet. App. 43a. Petitioner's own description of them as "*trompe l'oeil* pieces," C.A. App. A12, confirms that description. Petitioner sought "broad

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[3] The four remaining Justices in *Regan* did not quarrel with the conclusion that the color and size limitations were constitutional. They disagreed with the Court's judgment on the basis of their conclusion that the (now-repealed) unconstitutional purpose requirement was not severable from the balance of the statute. See 468 U.S. at 661-691 (Brennan, J., concurring in part and dissenting in part); *id.* at 691-692 (Powell, J., concurring in part and dissenting in part).

declaratory and injunctive relief," rather than a declaration regarding specific samples of his work. See Pet. App. 2a-3a. Accordingly, even if some of his work could not be mistaken for genuine, the fact that some of his work could be so mistaken would preclude the declaration and injunction he seeks.

In any event, this Court's conclusions in *Regan* are fully applicable to petitioner, regardless of whether specific works he produces could be passed as genuine. As explained above, the Court in *Regan* rejected a magazine publisher's challenge to the size and color restrictions on the ground that those restrictions were not content-based and that they were reasonable restrictions on the "manner" of communication in light of the government's substantial interest in preventing counterfeiting. Those justifications are equally applicable to the same restrictions as applied to petitioner.

Petitioner also argues that this Court's decision in *Regan* is inapplicable because of "changes in technology," Pet. 16, that allegedly render the size and color restrictions ineffective. In support of that contention, petitioner cites congressional testimony indicating that other measures may be more effective against counterfeiters armed with the latest high-tech gear. That fact, however, does not support petitioner's argument. Even if the size and color restrictions do not protect against counterfeiters who use the latest high-tech equipment, those restrictions may still deter many potential counterfeiters who have no access to such equipment or who lack the expertise to operate it. Moreover, regardless of whether counterfeit currency can be manufactured with high-tech equipment, the size and color restrictions continue to "ensur[e] that the [Boggs bills]

themselves do not have the capacity to deceive the unwary and inattentive." *Regan*, 468 U.S. at 658 (plurality opinion). Nothing that has occurred since this Court's decision in *Regan* suggests that the size and color restrictions do not continue to serve an important purpose in protecting the integrity of United States currency.

3. Petitioner also claims that his activities do not fall within the purview of Sections 474 and 504 because the possession and production offenses created by those statutes require a showing of intent to defraud. The courts below correctly rejected that claim.

a. The possession offense, codified as the fifth paragraph of Section 474, specifies the intent applicable to the offense; the offender must have an "intent to sell or otherwise use" the illustration. 18 U.S.C. 474. The district court correctly held that, in light of Congress's express specification of the intent applicable to the offense, it would be inappropriate for a court to read a further "intent to defraud" element into the statute.

The production offense, codified as the sixth paragraph of Section 474, does not contain an express intent requirement. The district court, however, correctly held that the statute's place in a carefully articulated scheme prohibiting a variety of counterfeiting offenses leads to the inference that "Congress intended some crimes to carry an intent to defraud requirement and others not, as evidenced by the differences in classification and punishment set out in the statute." Pet. App. 40a (footnote omitted). Contrary to petitioner's suggestion (Pet. 12-13), the statute does not thereby create a "strict-liability felony." As the district court explained, "the proper

standard of intent for a violation under paragraph six of section 474 is 'knowing.'" Pet. App. 41a n.40. Neither *Morrissette* v. *United States*, 342 U.S. 246 (1952), nor any other case cited by petitioner suggests that a stronger intent requirement should be read into the statute here. Cf. *Staples* v. *United States*, 114 S. Ct. 1793, 1804 (1994) (holding that federal firearms offense that contains no specification of intent requirement requires proof that "[defendant] knew of the features of his [gun] that brought it within the scope of the Act").

b. The holding of the court below that an intent to defraud is not required for conviction under the fifth and sixth paragraphs of Section 474 does not conflict with the decision of any other court of appeals. Petitioner's contention to the contrary (Pet. 19) is mistaken.[4]

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[4] Petitioner states that the courts below "followed cases stating that section 474 is a strict-liability felony, even though the Government conceded that those cases were in error." Pet. 19 (footnote omitted). Our alleged "concession" consisted in our argument that the fifth paragraph of Section 474 requires an "intent to sell or otherwise use" and that the sixth paragraph of Section 474 requires a "knowing[]" state of mind. See, *e.g.*, Gov't C.A. Br. 37-38. The courts below agreed with us on those points, as did the courts of appeals cited by petitioner that are alleged to have "stat[ed] that section 474 is a strict liability felony." See *United States* v. *Green*, 962 F.2d 938, 942-943 (9th Cir. 1992) (upholding jury instruction that paragraph six of Section 474 requires knowledge, but not willfulness); *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954) (holding in prosecution under paragraph six of Section 474 that "there is no need of proof that [the] impressions were calculated to deceive," but not discussing whether knowledge was required).

Petitioner cites (Pet. 19 n.20) *United States* v. *Parr*, 716 F.2d 796, 808 (11th Cir. 1983), which involved the possession offense defined in the fifth paragraph of Section 474. As petitioner notes, the Eleventh Circuit in that case stated that the defendant "intended to *use* the note to induce [an undercover agent] to purchase large quantities of [counterfeit] notes," and that "[s]uch intent to use for unlawful purposes clearly falls within the scope of 18 U.S.C. § 474." 716 F.2d at 808. That statement does not imply, however, that such an intent is required in each case. Indeed, the Eleventh Circuit specifically rejected an argument identical to petitioner's, stating that it "disagree[d] with [defendant in that case] that the intent standard of § 474 necessarily implies an intent to defraud or an intent to pass as genuine," because "Congress explicitly stated that an 'intent to sell or *otherwise use*' is the requirement." *Ibid.* The Eleventh Circuit's decision in *Parr* is thus in accord with the decision of the courts below.

Nor does the decision below conflict with the Fifth Circuit's decision in *Britt* v. *United States*, 391 F.2d 540 (1968). See Pet. 19 n.20. In *Britt*, the court of appeals merely stated that there was "ample evidence * * * from which the jury was entitled to conclude * * * that [the defendant] had the requisite criminal intent" to commit the offense defined in the predecessor to the sixth paragraph of Section 474. 391 F.2d at 542. The Fifth Circuit did not state or imply that it believed that that intent was anything other than the "knowing" state of mind required by the courts in this case.

Finally, the decision in this case does not conflict with the Eighth Circuit's decision in *Michener* v. *United States*, 157 F.2d 616, rev'd on other grounds,

331 U.S. 789 (1947). See Pet. 19 n.20. In that case, the defendant was not convicted under either the fifth or sixth paragraphs of Section 474, but instead under a statute that criminalized the possession of a plate or stone in the likeness of United States currency "with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting." 157 F.2d at 618. The statutory provisions at issue here contain no similar language, and there is no reason why the intent requirement applicable to the offense in *Michener* should be read into the different provision at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996

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Supreme Court, U.S.
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No. 95-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS,

Petitioner,

vs.

ELJAY BOWRON, ROBERT RUBIN, and JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE
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October Term, 1995

No. 95-1114

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE LOWER COURTS HAVE CRIMINALIZED AN ALARMING PORTION OF PROTECTED SPEECH, AND THE SOLICITOR GENERAL HAS GONE ALONG

The Department of Justice of the United States is of the view that 18 U.S.C. § 474, a felony statute, is applicable to anyone who "knowingly" makes an image "in the likeness" of money and that any such image is subject to forfeiture as contraband. What does this amazing theory mean in practical terms? Consider two recent "violations": an exact-size reproduction of a $1,000 bill printed on the front page of the March 3, 1996 Sunday edition of the *New York Times*; and a color reproduction of a $100 bill in the February 12, 1996 issue of *Time* Magazine (page 50). According to the analysis of the Solicitor General—and of the lower courts—every copy of these august publications is "contraband" and subject to seizure. We are sure that the editorial,

publishing, and printing staffs of these news organizations would be shocked to learn that they have engaged in felonious behavior; yet, according to the Solicitor General, they have done just that—for surely they "knew the features" (Govt. Br. 11) of the images they were reproducing. We can only conclude that these great news organizations were blithely unaware of the serious and severe penalties that the Government contends attach to activities such as theirs.[1]

In light of this widespread ignorance, the didactic effect of an opinion on the merits would appear to be of great value in helping to protect the Government's asserted interest.

The Government's treatment of Boggs stands in sharp contrast to its anemic enforcement efforts against the publishers of the *New York Times*, *Time*, and a host of other newspapers and magazines (*see* Pet. 16-17 & n.13; Pet. App. 51a-54a). Boggs has been repeatedly censored and repeatedly threatened with arrest. Secret Service agents have smashed his eyeglasses in their zeal to confiscate his work—work that graces the collections of the Smithsonian Institute, the Art Institute of Chicago, the British Museum of Art, and the Museum of Modern Art. While the Government attempts to suggest that its acts were in response to some kind of borderline counterfeiting operation, the record belies that suggestion (*see* Pet. 4-5). The District Court made explicit and unchallenged findings that Boggs has no intent to deceive anyone into accepting his work as money and that no one has ever

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[1]The lower courts recognized that the statute's phrase "intent to use" cannot mean, as apparently suggested by the Government here, "intent to use for any purpose." Instead, at Respondents' urging, they held that it must be narrowed to mean "intent to use for substantial economic benefit" (Pet. App. 38a). The examples just given are unaffected by the Government's protean litigating posturing, however, for they involved images of money used for "substantial economic benefit"; these publications are not throwaways; subscriptions and newsstand copies must be paid for.

complained to any law enforcement authority of being so deceived. *See* Pet. App. 35a & n.35. We wonder why Boggs seems to be a more appealing target than the mass media publishers ignored by the Government.

Because the Government continues to suggest (Br. 4) that Boggs' work is indistinguishable from counterfeit, we have supplied additional illustrations of Boggs' work in the Appendix to this reply brief. We note that the Government has not presented any record likenesses at all of Boggs' work to this Court.[2]

II. RESPONDENTS HAVE ABANDONED PRINCIPLES OF STATUTORY CONSTRUCTION AND CONSTITUTIONAL LAW

In order to accommodate the Secret Service's position in this case, the Solicitor General has been forced to abandon what he told this Court only two Terms ago in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). The Solicitor General neither responds to nor even acknowledges our discussion of that case (Pet. 12) and the two central propositions that he urged and that the Court applied: first, that the Court will construe a statute so as to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress; and second, that implicit in the criminal law is a "background assumption" requiring *scienter*.

A. *The Lower Courts' Strict-Liability Holding Is Flatly Unconstitutional*—The constitutional problems created by the

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[2]The Government's suggestion (Br. 8) that the relief requested in this Court turns on the *appearance* of the bills in the record, though, is flatly misleading. An unconstitutional statute may not be enforced against Boggs regardless of the appearance of his work; and, as the District Court pointed out, if section 474 must be read to carry the *scienter* element required at common law, "no jury could find that the statute applies to Boggs." Pet. App. 35.

interpretation of section 474 made by the lower courts and defended by the Government appear beyond repair. To begin, the statute was interpreted below as a strict-liability felony. While Respondents attempt to run away from the lower courts' holdings to this effect, the District Court could not have been clearer: "Congress included . . . strict liability offenses when such would aid in their efforts to drive out counterfeiting." Pet. App. 41a n.39. The Court of Appeals agreed. Pet. App. 2a (affirming for "substantially the reasons set forth" below). The Government does not and cannot deny that strict-liability felonies are forbidden where they will have a chilling effect on speech. *See X-Citement Video, Inc.*, 115 S. Ct. at 472; *Smith* v. *California*, 361 U.S. 147, 151 (1959). So the Government puts forward its own notion of "*scienter*" or "*mens rea*" in this Court. This notion has only trivial and negligible content—the Government says that it is enough that the actor had knowledge of what she was saying or doing—a simple "knowing" concept in clause six and a simple "intent to use" concept in clause five. The Government's position is like saying that a statute which has an express mental element such as "whoever knowingly votes, not being entitled to do so, shall be guilty" refers literally to people who "knowingly vote" (and thus excludes only those persons who vote thinking that they are doing something else) rather than covering those who vote with knowledge that they are not entitled to do so. The Government thus cuts out any connection to counterfeiting from this criminal statute, albeit in a way that verbally parts company with the "strict liability" rationale of the courts below.

B. ***The Government's Proposed "Fix" of the Lower Courts' Constitutional Misstep Is Unconstitutional***—Converting the statute into one with the minimalist *mens rea* elements proposed by the Government would have no practical effect other than "to criminalize a broad range of apparently innocent conduct." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). If the Government were correct, then every person publishing the magazines and newspapers identified above (*supra* p. 1) and in our Petition (pp. 16-17 & n.13, 51a-54a) or possessing copies of them

(except those inadvertently possessing them) would stand vulnerable to criminal prosecution. Such widespread criminalization would hardly comport with "settled expectations that the contents of magazines and film are generally [not] subject to stringent regulation." *X-Citement Video, Inc.*, 115 S. Ct. at 468-69. The Government's effort to substitute a trivial *mens rea* requirement for one that has some connection with the substantive evil of counterfeiting does not adequately take account of the First Amendment's prohibition on criminal statutes with *scienter* elements that "have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it." *Smith* v. *California*, 361 U.S. at 151. The First Amendment requires not merely *some* level of intent, but one that adequately protects free expression in the context of public expectations. That is why this Court firmly rejected the argument that it would be enough for a libel defendant to remain free to prove the truth of allegedly libelous statements, and instead held that the First Amendment requires "actual malice"—the level of intent commonly required by most states in libel cases. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

Moreover, even with the minimalist "knowing" *mens rea* element, the size and color restrictions on speech imposed by the statutory scheme cannot pass constitutional muster. To be sure, a plurality of this Court held those restrictions to be valid as applied in a particular case to Time, Inc. some 12 years ago. *Regan* v. *Time, Inc.*, 468 U.S. 641, 658-59 (1984). But the Court never resolved the question of the restrictions' general and facial validity. And radical changes in technology in a dozen years have made the restrictions hopelessly out of date. In 1984, a counterfeiting operation required expensive, specialized equipment. Today, as Respondents have repeatedly told Congress—and as the undisputed testimony in the record confirms—the would-be counterfeiter has access to relatively low-cost computer and laser-printing equipment. *See* Pet. 17-18 & nn.14-15. The Government thus concedes (Br. 9) that "other measures may be more effective" in responding to this new threat and that "the size and color restric-

tions do not protect against counterfeiters who use the latest high-tech equipment."

But to say, as the Government does (*id.*), that "those restrictions may still deter many potential counterfeiters who have no access to such equipment or who lack the expertise to operate it" is doublespeak. Laser printing and desktop publishing have become ubiquitous. The Government's unstated premise is that the new technologies are arcane, inaccessible, and expensive—like cyclotrons, particle physics accelerators, or the like. Instead, as Respondents' own statements outside of this Court confirm (see pp. 6-7, below), the era of desktop computers and cheap color laser copiers has eclipsed the old-fashioned methods of counterfeiting, both in quality of product and in cheapness and accessibility of equipment—just as desktop publishing tends to make the old-fashioned, bulky mechanical linotypes, engraving equipment, and printing presses obsolete.

Remarkably, the Government even tells this Court (Br. 10)—without support from the record or elsewhere—that "[n]othing that has occurred since this Court's decision in *Regan* suggests that the size and color restrictions do not continue to serve an important purpose." That fantasy is belied not only by the record (*see* Bittman Decl. ¶ 8) but by Respondents' repeated statements to Congress that advances in modern technology require a significant overhaul of their whole anti-counterfeiting efforts. *See* Pet. 17-18 & nn.14-15. Even within the last month, for example, the Undersecretary of the Treasury for Domestic Finance reminded Congress that "the rapid advancement that has taken place in recent years in reprographic technologies such as color copiers and computer scanners has dictated that we take more significant steps in order to maintain the security and integrity of U.S. currency and stay ahead of the counterfeiting threat."[3] Respondent Eljay

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[3]*Counterfeiting of U.S. Currency Abroad: Hearing Before the Subcomm. on General Oversight and Investigations of the House Comm. on Banking*, 104th Cong., 2d Sess. (Feb. 27, 1996) (Prepared Statement

Bowron, Director of the Secret Service, added that "[t]he equipment used by the 'casual' counterfeiter and the career criminal continues to be readily available. As technology moves forward, that same equipment becomes more affordable, and more accessible."[4]

Moreover, the First Amendment requires a *comparative* analysis: a statute is not "narrowly tailored" whenever "a substantial portion of the burden on speech does not serve to advance the goals" of the Government. *Simon & Schuster, Inc.* v. *New York Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991). The degree to which the Government's goals are advanced by this particular statute has dropped like a stone, because of the rapid changes in technology during recent years. In light of those changes, in light of the divided holding of *Regan* v. *Time, Inc.* (the District Judge in this case candidly acknowledged having difficulty parsing *Regan*[5]), and in light of this Court's status as the ultimate arbiter of constitutional law,[6] an evaluation of the statute's constitutionality is warranted.

C. ***The Government's Reading of the Statute Violates the Rules of Statutory Construction***—Even if the Government's proposed minimalist *mens rea* element passed constitutional muster, it would not comport with settled rules of statutory construction. The Government's reading of the statute drives the Court toward—rather than away from—constitutional issues. That

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of Undersecretary Hawke).

[4]*Id.* (Prepared Statement of Director Bowron).

[5]C.A. App. 245 ("it put me to sleep").

[6]*See Payne* v. *Tennessee*, 501 U.S. 808, 827-28 (1991); *United States* v. *Scott*, 437 U.S. 82, 101 (1978); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

reading is also drawn out of thin air. We had thought that questions of statutory interpretation were to be resolved by attempting to discern what Congress intended—not what suits the Government in a particular case. The Government's proposed minimalist "knowing" *mens rea* element, though, does not come from the text of the statute; it does not come from the statute's common-law roots; it does not come from the statute's legislative history; and it does not come from applying canons of statutory interpretation. All of those sources for divining congressional intent point to the conclusion that Congress intended to incorporate the level of *scienter* applicable at common law—a sensible interpretation that would save the statute from unconstitutionality. Yet the Government claims to have navigated the straits between its Scylla of strict liability and its Charybdis of admitting that the statute carries the common-law level of *scienter* (thus excluding Petitioner) by inventing a minimalist mental element that comes from nothing. That is directly contrary to the Government's own position in *X-Citement Video, Inc.*

III. THE CONFLICT IN THE CIRCUITS IS UNDENIABLE

In our Petition we demonstrated that a number of courts have interpreted and applied section 474 and closely analogous statutes to carry the *mens rea* level required at common law—an intent to engage in passing counterfeit money as genuine or a similar unlawful purpose. Pet. 19-20 & nn.20, 22. The Government ignores all but three of these cases. Its effort to distinguish even these three is unavailing. Thus, the Eleventh Circuit in *United States* v. *Parr*, 716 F.2d 796 (11th Cir. 1983), held that section 474 was violated by a defendant with an "intent to use for [the] unlawful purposes" of enticing others into a counterfeiting conspiracy. 716 F.2d at 808. Nowhere did that court approve the Government's position here—that "knowledge" or "intent to use for any purpose"—is sufficient to convict.

Similarly, in *Britt* v. *United States*, 391 F.2d 540 (5th Cir. 1968), the Fifth Circuit held that the evidence supported the jury's

conclusion that the defendant "had the requisite criminal intent to commit the offense," because "counterfeiting was probably committed by someone." 391 F.2d at 542. The defendant's "requisite criminal intent" was to engage in "counterfeiting." In fact, the defendant argued that he was "merely conducting a scientific experiment." 391 F.2d at 541. If the Fifth Circuit had thought that a "knowing" state of mind was sufficient for conviction, surely it would have observed that this purported defense was irrelevant, for someone conducting a scientific experiment possesses a "knowing" state of mind: he or she "knows the features" (Govt. Br. 11) of the experiment's object.

Finally, the Eighth Circuit in *Michener* v. *United States*, 157 F.2d 616 (8th Cir. 1946), *rev'd on other grounds*, 331 U.S. 789 (1947), concluded that "possession would be innocent were it not possessed with intent to use the plate in counterfeiting." 157 F.2d at 620. We are puzzled by the Government's attempt to distinguish this case on the theory that the statute at issue was not section 474, for it was section 474's direct predecessor.[7] And while the court did not restate the obvious—that *all* clauses of the statute carried this *mens rea* requirement—its entire discussion of intent would have been irrelevant if there were a mere "knowing" *mens rea* level for some clauses of the statute.

* * * *

A radical departure from the public's settled expectations has been asserted as the basis for upholding the judgments below. It is a departure that is applicable to a great number of legitimate

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[7]Section 150 of the first revision of the Criminal Code, ch. 321, § 150, 60th Cong., 2d Sess., 35 Stat. 1088, 1116 (Mar. 4, 1909), at issue in *Michener*, was redesignated—with minor changes in phraseology—as section 474 in the 1946 recodification of the Criminal Code, ch. 645, 80th Cong., 2d Sess., 62 Stat. 683, 706 (June 25, 1948), where it remains today.

publishers, advertisers, and artistic institutions. It is a departure that required the lower courts and the Government to ignore well-established constitutional rights and settled principles of statutory construction. And it is a departure from the interpretations of the other courts of appeals applying the statute.

CONCLUSION

For the foregoing reasons, and the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

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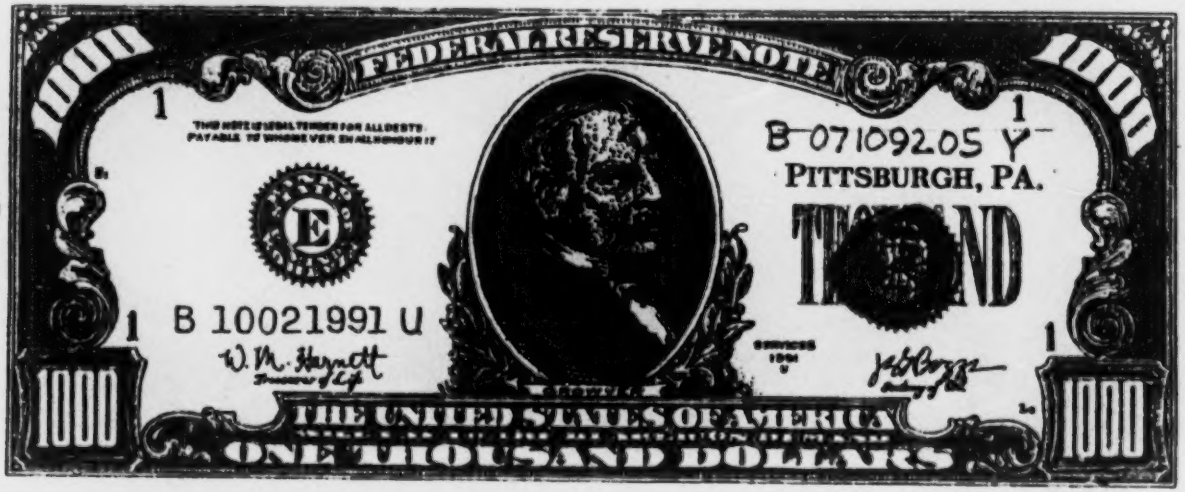
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